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No. _____

IN THE

Supreme Court of the United States

October Term, 1983

STANLEY YALKOWSKY, ANNA YALKOWSKY, PEREE YALKOWSKY, and ANNA YALKOWSKY as Administratrix of the Goods, Chattels and Credits which were of MORRIS YALKOWSKY, Deceased; and Infants IRINA H. YALKOWSKY, RISAH SURAH YALKOWSKY and LARIN YALKOWSKY by STANLEY YALKOWSKY, their father and natural guardian,

Plaintiffs-Appellants,

—v—

BENJAMIN SHEDLER, ALLEN H. WEISS, ALLEN J. KOZUPSKY, MARK ZAFRIN; SHEDLER, WEISS, KOZUPSKY & UNGER, a Law Partnership; SHEDLER, WEISS & KOZUPSKY, a Law Partnership; SHEDLER, GROSSMAN, WEISS & KOZUPSKY, a Law Partnership; GROSSMAN, ZAFRIN, WEISS & KOZUPSKY, a Law Partnership; AMERICO NAPOLITANO, DEANNE NAPOLITANO (YALKOWSKY); HON. WILLIAM A. WALSH, JR.; GERALD STERN, ROBERT H. TEMBECKJIAN; FRANK CASTALDI, CARL VERGARI, JONATHAN FRIEDMAN, J. HENRY NEALE, JR., JOHN BRUNO, THOMAS C. KAVANAUGH, LORRAINE T. CELIO, RICHARD L. GERLOFF, JOHN BARRY, JOSEPH A. RICE, HON. MILTON MOLLEN, HON. GUY MANGANO, HON. VITO J. TITONE, HON. M. WEINSTEIN, HON. JOSEPH P. COHALAN, HON. FRANK A. GULOTTA and IRVING SELKIN; SCARSDALE NATIONAL BANK & TRUST COMPANY, IRVING BANK CORPORATION; MICHAEL GENTILE, JOSEPH ROSENBERG, KIM RINGLER, HON. RICHARD A. BROWN, HON. ISAAC RUBIN and HON. SEYMOUR BOYERS,

Defendants-Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STANLEY YALKOWSKY, ESQ.
Plaintiff-Appellant Pro Se and Attorney for the other Appellants
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Questions Presented

1. Whether the appellants' constitutional protections under 42 U.S.C., 1983 of the Civil Rights Act guaranteeing to appellants the right to family, fatherhood and daughterhood had been denied by the lower courts, thereby depriving the appellants a most basic guarantee of our constitution, the right to family.

2. Whether the District Court and the Court of Appeals for the Second Circuit decided federal questions of substance in a manner not in accord with applicable decisions and in direct contradiction to correct holdings.

(a) Whether the order of the Federal Court, Southern District, affirmed by the Court of Appeals, Second Circuit, was non-final and therefore non-appealable;

(b) Whether the plaintiff's complaint did present cognizable causes of action;

(c) Whether largeness of a complaint is reason to dismiss a complaint.

3. Whether it is a violation of the appellants' constitutional rights under the due process clause of the fourteenth Amendment to deny appellants counsel, court and legal disputation in the lower courts and force his claims, in effect, to be heard for the first time in the United States Supreme Court.

(a) Whether Judge Griesa deprived the plaintiff of his constitutional safeguards in dismissing the plaintiff's complaint, which he admittedly did not read nor intend to read;

(b) Whether the Court of Appeals, Second Circuit of the United States,

by the improper conduct of Justice Ellsworth Van Graafieland, did deny the plaintiffs-appellants due process and counsel when matters were deliberately scheduled for oral argument at times Justice Van Graafieland knew plaintiff was recovering from surgery.

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Parties to the Proceeding

The caption contains the names of all parties proceeding before the Court of Appeals and the District Court.

Opinions Below

The order and opinion of the United States Court of Appeals for the Second Circuit appears in the Appendix *intra* at (15A-17A).

The order and opinion for the Southern District of New York appears in the Appendix *intra* at (1A-14A).

Jurisdiction

The order or judgment of the Court of Appeals for the Second Circuit was entered on June 17, 1983 (15A-17A). The Petition for Certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3) or 28 U.S.C., Section 1254(a).

Constitutional Provision and Statutes Involved

Fourteenth Amendment:

". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of Facts

Judge Thomas Griesa of the Federal Court, Southern District, assigned to this matter scheduled a conference with his law clerk urging the plaintiff to not make any motions concerning the failure of the defendants to timely respond to the pleadings, with the plaintiff agreeing, and with the same clerk assuring the plaintiff that there will be no dismissals, and that the conference will be held merely to narrow issues and for further clarification of the actions.

There was no conference. The judge dismissed the plaintiff's complaint after admitting that he did not read the complaint; and after stating that he had no intention to read the complaint. And when the plaintiff protested that this was apparently unfair, the judge ordered that an amended complaint be drafted and submitted to the judge first

before service upon any of the defendants (intra 18A-26A).

The judge's actions were arbitrary and abused every fundamental and basic right afforded to a plaintiff before a court, including his right to counsel, his right to be heard, his right to present his claim, his right to a forum. The only reason that can be adduced for Judge Griesa to dismiss the plaintiff's complaint was that the complaint was too long, and that it burdened too many important people. The complaint was actually short by comparison, in that it named thirty-five defendants and included complex and highly inflammatory and unpopular material that required precise and factual exposition, not capable of being presented in what can be termed a short complaint.

The proper recourse for the plaintiff was to appeal such decision, for to

present an amended complaint without reason would in essence be denying the plaintiff his right to amend for reason, and in that the judge's decisions were so capricious and biased as to make the amending of such a complaint before such a judge foolhardy.

Additionally, it was clear as the facts unfolded that Judge Griesa did have extra-judicial and improper contact with the defendants and their attorneys, rendering his further connection with this matter most inappropriate. Had Judge Griesa read the complaint he would have learned that the plaintiff described factually and legally correct pleadings in which he and his family presented (Appendix A) -

(1) claims of violation of Section 1983 of the Civil Rights Laws, which deprived the plaintiff and his family of their filial relationship,

which was done under color of law and in conspiracy with others;

(2) that the district attorney had denied the plaintiff of his equal protection under the law, a class action;

(3) the plaintiff was seeking emergency relief from the Federal Court and requesting that all matters presently pending in the State Court be transferred to the Federal Court because of the horrible oppression occurring in the State Court.

The judge would have also learned that with thirty-five defendants and seven plaintiffs the names and their addresses alone would have taken up at least one-fifth of the complaint in and of itself.

The complaint described each defendant and his acts in clear, plain language, and did establish their

liability in these actions. The plaintiff properly pleaded his first cause of action by clearly and definitively alleging the conduct of each defendant and their participation in a conspiracy to deprive the plaintiffs of their constitutionally guaranteed right to a family.

Furthermore, the plaintiff's second cause of action and right to class action status were properly pleaded yet never responded to nor addressed by Judge Griesa of the Southern District, nor addressed by the Court of Appeals, nor was the emergency relief sought in the plaintiff's third cause of action responded nor addressed by defense or judge of the Federal Court, as issue and facts were ignored and due process denied.

Judge Walsh

Clearly and with exhibits the plaintiff alleged that Judge William Walsh of the Westchester Supreme Court of New York, illegally denied visitation to the plaintiff and his children, without a hearing and without a motion, and in violation of the plaintiff's constitutional rights, when Judge Walsh injudiciously urged the defendant to not provide visitation, and as a result did deprive a family of contact and relationship for over three-and-a-half years, despite the pleas of the father, as well as the children, to see each other.

This act of Judge William Walsh was conducted in concert with other third parties, including the paramour, and now husband, of the defendant, Americo Napolitano, who aided in the prevention of visitation to such a degree as to be found guilty of harassment in the

Scarsdale Criminal Court for his interference with the plaintiff's visitation.

It was also shown how Judge William Walsh engaged in ex-parte conduct with defense attorneys, and how he ran from the bench rather than allow a witness to testify, that witness being the Scarsdale National Bank, which would have shown the judge's perjury and dishonest connection with certain parties in this action, and his illegal conduct in this matter, which included his own knowledge of the assets of the defendant, and his knowledge that her attorneys received counsel fees, which they had denied receiving, which included documented evidence, all of which were inappropriately hidden from view by Judge William Walsh, who even aided Mr. Napolitano, who had admitted to forgeries, by interferring in a most injudicious manner with Mr. Napolitano's

testimony by telling Mr. Napolitano to not get himself any further into this matter.

Judge Walsh's conspiratorial activities with J. Henry Neale, Jr., the attorney for Scarsdale National Bank, resulted in the prevention of the most relevant evidence, which was done by Judge William Walsh for the purpose of protecting himself from his illegal decision in denying visitation.

Judge Walsh committed a host of actions, rulings and decisions which were vile and done for the design of protecting himself from the consequences of his illegal decisions, in an effort to justify them by oppressing the plaintiff.

The Judicial Conduct Commission

The Judicial Conduct Commission, who was placed on notice of the vile actions of Judge William Walsh, in

effect endorsed his conduct and considered his conduct merely matters of judicial review, when they were matters certainly within the province of the Judicial Conduct Commission, who by refusing to act permitted the continuation of Judge William Walsh's conduct and its subsequent harm to the plaintiff and his family, which could have been stopped had this Judicial Conduct Commission performed its duties and not protected the misconduct of Judge William Walsh, who was protected. Because if the Judicial Conduct Commission were to do its job as enjoined upon it by law, it would have had to find Justice Milton Mollen of the Appellate Division, Second Department equally guilty of misconduct in illegally preventing the plaintiff from his visitation with his children, since Milton Mollen endorse such conduct (27A-29A).

The reason the Judicial Conduct Commission would not act concerning the activities of Justice Milton Mollen is that Justice Milton Mollen is closely connected with the Judicial Conduct Commission and presides at hearings to remove justices from the bench, in which Gerald Stern, the Administrator of the Judicial Conduct Commission is the lawyer representing such Commission.

Americo Napolitano

The plaintiff showed how Mr. Napolitano did interject himself as a third party together with others, and together with Milton Mollen in a conspiratorial effort to hide assets of the plaintiff's ex-wife, Deanne Yalkowsky, in order to justify Judge William Walsh's decision to prevent visitation based on the unfounded and false claim that Deanne Yalkowsky had no assets and did not pay

her attorneys, even though this defense in and of itself, and this contention in and of itself, were incapable of denying the plaintiff his just right to visitation. But nonetheless, based on these false claims, and acting in complicity with each other, the defendants did all conspire to deprive the plaintiff of his visitation, in an effort to claim that by reason of the plaintiff's failure to support his children he has forfeited his right to being a father and the children had forfeited their right to being sons and daughters.

To effect this fraud and conspiracy and to effect this denial of the plaintiff's constitutional rights, Americo Napolitano did send and did conspire to send false documentation concerning his financial relationship with Deanne Yalkowsky.

The Lawyers

The lawyers consisting of Benjamin Shedler, Allen Weiss, Allen Kozupsky and Mark Zafrin, did together act with the other defendants with the same purpose in mind of denying the plaintiff his just visitation. This was evidenced by a letter of Benjamin Shedler, dated July 2, 1979 (intra 30A), in which he inappropriately, immorally and illegally advised his client to not provide visitation. And in addition, Benjamin Shedler testified to his efforts to preventing visitation, actions outside his legal province, in that he did not move for any modification of such visitation, and did deny the plaintiff his visitation without hearing or order.

Also included were numerous examples of Benjamin Shedler's interference with visitation, as well as false allegations and false statements

of not being paid by his client Deanne Yalkowsky, despite the presentation by the plaintiff of documentary proof of his payment, as well as testimony by Benjamin Shedler himself, which establish his receipt of payment, and the incontrovertible evidence that the defendant, Deanne Yalkowsky, had vast assets, indeed hundreds of thousands of dollars, all proven by documentary evidence, all of which were denied, when it was impossible to be denied, by Benjamin Shedler and Allen Weiss, and Allen Kozupsky, and Mark Zafrin, again despite evidence of thousands of dollars in legal fees being received by the law firm.

And indeed, evidence was provided of Allen Weiss, Benjamin Shedler and the defendant, Deanne Yalkowsky, together submitting a financial statement prepared by the attorneys, which stated

that the defendant had no assets and never paid any counsel fees, when this was a known falsehood, accepted and endorsed by Judge William Walsh, who acted together with these defendant attorneys and the other defendants in their fraud upon the plaintiff, notwithstanding the evidence presented of at least eight bank accounts possessed by Deanne Yalkowsky, as well as numerous safe deposit boxes, as well as salaries received, as well as stocks and numerous assets.

Additionally, evidence was presented of the interference by these attorneys with the children themselves, of intercepting letters, and presenting to the children a false picture of their father as being insane, bereft of his senses and as harmful to his children.

The Departmental Disciplinary Committee

The Departmental Disciplinary Committee was presented with the very same evidence that was presented to Judge William Walsh, which showed all the misconduct already described concerning these attorneys. The Departmental Disciplinary Committee, by the activities of Michael Gentile, Joseph Rosenberg and Kim Ringler, not only ignored the plaintiff's complaints, but falsely stated that an investigation was being conducted as to Weiss, Kozupsky, Zafrin and Grossman, when such investigation was never instituted, and Kim Ringler, following the pattern of Joseph Rosenberg, misled the plaintiff for almost two years into believing that a complaint had been made against these lawyers, when indeed none was ever made, and did allow, and in fact, endorse the defendant attorneys to continue their

misconduct with full knowledge that there was no complaint, and with the diabolical aid of the Appellate Division Justice E. Leo Milonas, whom the plaintiff later discovered had an ongoing relationship with such attorneys, and did by his influence and power hinder the just disputation of the harms of such defendant attorneys, and did protect these attorneys from their acts of misconduct, which included the destruction of a family, all for the purpose of obscuring from view the improper relationship of attorneys and judges practicing in the courts. Justice Milonas announced his disqualification from certain matters involving the defendant attorneys on April 29, 1983, but only after he had already participated in decisions on March 15, 1983 and on May 24, 1983, which he should have been disqualified from.

Scarsdale National Bank

The activities of this bank and its attorney, J. Henry Neale, Jr., so well connected with Judge William Walsh, did enable Judge William Walsh and the defendant to claim destitution by the Deanne Yalkowsky, by sending false information which hid from the plaintiff the assets of the defendant, which was done knowingly, visciously and cruelly by officials of the Scarsdale National Bank, who also disobeyed court orders and aided in forgery and fraud, altercation of checks, and the failure and refusal to obtain an endorsement from the plaintiff himself, in their misconduct and joint criminal conduct with the defendant, to aid her and to aid Judge William Walsh and the others named herein in their efforts to defraud the plaintiff of his family.

Included in their fraud and their attempts to deny the plaintiff his family was a false statement which prevented the plaintiff from learning that his ex-wife, the defendant Deanne Yalkowsky, was the president of Greenlawn Landscaping Corporation, who did receive salaries and did indeed possess control of literally millions of dollars, in their efforts to deny the plaintiff his family, which led to Judge Walsh literally running from the bench when the plaintiff attempted to present the true facts concerning Scarsdale National Bank's involvement with the defendant and Mr. Napolitano.

Irving Bank Corporation

Irving Bank Corporation's conduct was complicated by the fact that it is the parent corporation of Scarsdale National Bank and has as its vice

president one John Barry, who has the dual role of being vice president of Irving Bank Corporation and director of Scarsdale National Bank; but even moreso John Barry as vice president of Irving Bank Corporation has as his primary responsibility the supervision of Scarsdale National Bank, and when placed on notice of all the misconduct of such bank, by being sent numerous letters and in numerous conversations with the plaintiff, despite his interlocking directorship, and despite the high degree of fidelity required in management of banks, did not investigate nor attempt to check or correct the misconduct described, since to do so would affect his directorship and position at Scarsdale National Bank.

District Attorneys of Westchester - Vergari, Castaldi, and former District Attorney Jonathan Friedman

When Jonathan Friedman was the district attorney in this matter, he was presented with numerous acts of criminal conduct that occurred during the trial and in pre-trial pleadings before Justice Walsh of the Supreme Court. Complaints included allegations of misconduct by Judge Walsh. Jonathan Friedman sent Judge Walsh all of the plaintiff's complaints, as well as his evidence, and asked Judge Walsh to determine whether crimes had been committed or not. This was an act so cruel, if not bizarre, and so unconstitutional as numerous cases, such as Briggs v. Goodman, 384 Fed. Supp. 1228 (Dist. of Columbia), and others will describe, that it borders on being criminal in

nature.

To think that while the judge was deliberating on a decision involving Stanley Yalkowsky, and confidential evidence was presented to a District Attorney of Westchester County, the district attorney compromised the plaintiff in such a cruel and inhuman manner, and without fear of its consequences, by asking the potential defendant himself, Judge William Walsh, to decide whether the evidence presented was cause for investigation by the District Attorney's Office. Needless to say Judge Walsh informed Jonathan Friedman that he did not think that there was any evidence of any crimes, and so Jonathan Friedman, based on Judge Walsh's opinion, permitted this horror to continue for the years that followed.

The District Attorneys of Westchester County went further, concluding

that the forged checks, and forged notaries, and perjuries, and false affidavits, and all the numerous criminal acts presented were not crimes since Stanley Yalkowsky is the victim. This is all described clearly, and plaintiff believes, correctly, and does show the total disgrace of the Westchester District Attorney's Office.

Had Jonathan Friedman or the other district attorneys done their duty, Judge Walsh would not have been enabled to continue his criminal acts, nor the Scarsdale National Bank and the other parties the plaintiff has described above.

The Appellate Division, Second Department - Justice Milton Mollen

Justice Milton Mollen, supported by Justices Hopkins, Gibbons and Weinstein, on June 30, 1981 denied visitation

to the plaintiff illegally and without modification or hearing (intra 27A-29A), and in violation of the Constitution, and did act in concert with Judge Walsh and the attorneys for the defendant in illegally depriving court ordered visitation (intra 29A, 34A), and indeed court ordered joint custody (intra 37A) denying the plaintiff and his children the right to see each other; and at the same time refused to relieve Judge Walsh, who was also depriving the plaintiff and his children from their visitation with one another (intra 39A). This is deprivation to parent and children of their right to family.

Irving Selkin

Irving Selkin is the Clerk of the Appellate Division, Second Department and enjoys a position of great prestige and influence. The plaintiff will describe

the following incident to dramatize just how powerful Irving Selkin is. Back in July of 1981 Justices Mollen, Cohalan, O'Connor and Thompson denied the plaintiff's motion to stay the sale of the defendant's house in a unanimous, unexplained decision. On August 26, 1981 the same motion was made by the plaintiff and again was unanimously denied by the same justices. The plaintiff visited the Appellate Division, Second Department seeking an explanation as to why two previous motions for a stay were denied without explanation. Mr. Selkin confidentially advised the plaintiff to not make complaints about judges and the result would be different. So on September 23, 1981 the same motion was made again, and on the advice of Mr. Selkin the plaintiff left out his charges of misconduct by judges and attorneys, and miraculously the same

motion was granted unanimously by the same judges.

This same Mr. Selkin had some private "deals" he wanted to make which no agency, judge or court, federal or state, wanted to hear about, despite the appellant's protestations.

The Second Cause of Action

The second cause of action sought a certification of a class action by showing that the district attorney, by refusing to prosecute certain crimes because of its policy of not so prosecuting while there is pending litigation, has deprived that class of people known as litigants of equal protection of law and their constitutional safeguards provided by Section 1983 of the Civil Rights Law; and in so doing by this policy the district attorney has actually encouraged frivolous litigation

as a defense to a crime, for as by so litigating the defendants so forestall their own prosecution.

The Third Cause of Action

The third cause of action was actually a motion for removal from the state court of pending litigation between the plaintiff and the defendants, based on hostility of Supreme Court justices and state agencies such as the Judicial Conduct Commission and the Departmental Disciplinary Committee, whose personnel are inextricably connected with the Supreme Court justices and who are themselves named defendants, and in their defense have set up a wall of denial to the plaintiff of all legal recourse in the state courts of New York, and have acted oppressively and retaliatory to the plaintiff.

The State Judicial Conduct Commission, so interrelated and interconnected with justices of the Appellate Division, Second Department, principally Milton Mollen, has refused to abide by their own rules and laws in their efforts to protect the misconduct of judges under their jurisdiction.

The Departmental Disciplinary Committee of the City of New York in like manner has protected the totally vile conduct of the defendant attorneys described herein, if only to again protect certain judges from exposure which would ultimately result if they were to do their duties regarding the described misconduct of the defendant attorneys.

The District Attorney of Westchester has refused to act in this matter in the face of evidence, no matter how compelling or overwhelming it might be,

in their efforts to protect the defendant judges described herein -- all of these acts occurring at terrible expense to the plaintiff and his family.

The hostility demonstrated by the District Attorney of Westchester is most demonstrably borne out when District Attorney Anthony Citarella, who originally wished to institute an investigation based on the plaintiff's charges, but after consulting with his superiors, Mr. Castaldi and Mr. Vergari, announced to the plaintiff that forgery and perjury are not crimes if Stanley Yalkowsky is the victim.

The plaintiff explained his basis of being deprived of his constitutional safeguards under Section 1983, and the futility of maintaining actions in the state courts as grounds for the federal court to assume jurisdiction. The plaintiff explained how in motions

brought in the state courts the defense raised plaintiff's complaints about the Appellate Division justices and Supreme Court justices, even if the motions had no connection with the matters before the Supreme Court justices. The resulting prejudice towards the plaintiff was enormous. The actions of the Appellate Division, Second Department and their malice towards the plaintiff is very real and is demonstrated by hard and clear evidence.

Confidential information provided in legal documents find their way into the hands of opposing counsel, J. Henry Neale, Jr., the attorney for Scarsdale National Bank, almost immediately.

The Appellate Division, First Department is not too different. When the plaintiff seeks relief from the Departmental Disciplinary Committee, relief that is overwhelmingly correct,

it is inexplicably denied, when to grant the plaintiff his relief would have the effect of exposing certain Appellate Division justices.

Summary of Fact

The plaintiff-appellants were awarded visitation with each other when on August 23, 1978 Justice John Marbach ordered that the cross-motion is granted and plaintiff is awarded temporary visitation (intra 34A).

The children involved were eight and ten years of age at the time.

On January 4, 1979 Judge William Walsh ordered, "Consequently, the father is co-custodian of his children" (intra 37A). No hearing was even had to change that status, nor was any modification of the plaintiff's visitation rights presented to any court. Yet despite these standing orders, the mother prevented the father from seeing his children, with the aid of the co-defendants described herein. And on July 3, 1979 Benjamin Shedler, the attorney for the mother, and a defendant herein, wrote, ". . . I don't

think it appropriate that visitation be continued . . ." (intra 31A).

Every effort at visitation failed as the years passed. Hundreds of thousands of dollars in legal fees and countless motions, as children and parent were taken further and further from each other.

On June 1, 1981 the plaintiffs-appellants' former attorney pleaded with Judge Walsh in Westchester Supreme Court:

> "All I want you to do, judge is give me a little bit of equity here, give me a day's visitation, let him say hello to these children."

Judge Walsh replied:

> "Counsel, I appreciate your emotional appeal. I am not going to grant it. Take an immediate appeal from this order which Mr. Totero will give you a copy of so there won't be a delay. . ."

(Portion of order to show cause returnable June 22, 1981 in Westchester Supreme Court, Appendix A, intra 39A).

The plaintiff appealed to the Appellate Division, Second Department

seeking (i) to relieve Judge William Walsh as trial judge, and (2) seeking a direction that the plaintiff be permitted visitation forthwith with his two youngest children, in accordance with prior court orders. The motion was denied on June 30, 1981 (intra29A) and when the plaintiff renewed the motion before Judge Walsh it was denied again on August 28, 1981 (intra 42A-46A).

So, despite standing court orders, and despite pleas, by the father and the children themselves, made directly to Judge William Walsh, a family was totally deprived of each other for over three-and a-half years, and standing court orders illegally ignored and violated by justices of the Supreme and Appellate Courts of the State of New York, acting under color of law and in concert with each other, as an act of cruelty successfully destroyed a family.

Reasons for Granting the Writ

At the outset it must be stated that there was no appearance before the lower court, in that the plaintiff's entire arguments, facts, evidence and legal principles were totally ignored as he was denied due process, oppressed and denied a forum, resulting in the plaintiff presenting these very same arguments that were not addressed in the lower court in their entirety to this United States Supreme Court.

Point I

Whether the appellants' constitutional protections under 42 U.S.C., 1983 of the Civil Rights Act guaranteeing to appellants the right to family, fatherhood and daughterhood had been denied by the lower courts, thereby depriving the appellants a most basic guarantee of our constitution, the right to family

The following cases and law uphold the plaintiffs' cause of action which violated their civil rights: Duchesne v. Sugarman, 566 Fed.2d 817 (1977 2d Cir.). In this action the party brought civil rights action to obtain money damages for the alleged unlawful and unconstitutional action of City Child Welfare Bureau in taking and restraining custody of plaintiff's two children without plaintiff's consent, and without benefit of a hearing or court order. This was a violation of Section 1983.

". . . Family life is one of the liberties protected by the Due Process Clause of the fourteenth Amendment." Cleveland Board of Ed. v. LaFleur, 414 U.S. 632, 639-640 (1948) (Duchesne, supra)

"Here we are concerned with the most essential and basic aspect of familial privacy - the right of the family to remain together without the cohersive interference of the awesome power of the state. This right to the perservation of family integrity encompasses the reciprocal rights of both parent and children. It is the interest of the parent in the "companionship, care, custody and management of his or her children, (Stanley v. Illinois, 405 U.S. 645, 651 92 S.Ct. 1208 1212, 31 L.Ed. 551 (1972) and of the children in not being dislocated from the intimacy of daily association with the parent." (Organization of Foster Families, 431 U.S. at 844, 97 S.Ct. at 2110; Duchesne, supra.)

"The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential'." (Meyer v. Nebraska, 262 U.S. 390, 399 . . .") (Duchesne, supra).

"If a state were to attempt to force the break-up of a natural family over the objection of the

> parents and their children without some showing of unfitness. . . I should have little doubt that the state would have intruded impermissibly into the 'private realm' of family life which the state cannot enter." (Prince v. Massachusetts, 328 U.S. 128, 166 64 S.Ct. 438. . .; Organization of Foster Families, 431 U.S. at 862, 97 S.Ct. at 2110 (Stewart, J., concurring).

The conclusion in Duchesne, supra, was the following:

> "The family has been described quite properly as 'perhaps the most fundamental institution of our society,' Trimble v. Gordon, 430 763, 97 S.Ct. 1459 1464, 52 L.Ed. 2d 31 Ed. (1977)."

Ms. Perez and her two children were deprived of their right to live together as a family without due process of law. The Civil Rights Act, 42 U.S.C. Sec. 1983 establishes a cause of action against any person who, acting under color of state law causes an individual to suffer from a constitutional deprivation.

"We remand a new trial in which the jury must determine which, if any, of the appellees are liable under Section 1983 for the constitutional deprivation suffered by the appellants. If liability is established, the extent of damages must also be fixed by the jury." (See also Doe v. New York City Department of Social Services, 649 Fed. 134 (2d Cir. 1981).

Point II

Whether the District Court and the Court of Appeals of the State of New York decided federal questions of substance in a manner not in accord with applicable decisions and in direct contradiction to correct holdings

Judge Van Graafieland in his order, dated June 17, 1983, failed to understand and comprehend the distinction between Kozemchak v. Ukranian Orthodox Church of America, 443 F. 2d 401 (2d Cir. 1971) and the view of the Ninth Circuit held in Elfenbein v. Gulf & Western Industries Inc., et al., 501 F. 2d 445 (9th Cir. 1978):

> "If the District Court merely dismissed the complaint without comment, then the view, at least in this Circuit, is that the District Court intended to terminate the action and that the dismissal order is final."

The fact that Judge Griesa admitted he did not read the initial complaint, coupled with his bare claim that the complaint was too long and named

important people, in reality was a final determination, since to hold otherwise would mean that a judge would have the power and ability to just dismiss complaints for no reason at all in the first instance, thereby translating all original complaints into final, amended complaints. This would be an abuse.

Furthermore, in Hurst v. California, 451 F. 2d 350 (9th Cir. 1971) it was held that if a plaintiff cannot amend, or declares his intention to stand on his complaint, the order becomes final and appealable.

Point II(A)

Whether the order of the Federal Court, Southern District, affirmed by the Court of Appeals, Second Circuit, was non-final and therefore non-appealable

Was the order appealable, since Judge Griesa expressly allowed the plaintiff leave to amend the complaint? And did the plaintiff have the right to appeal such order and not amend such complaint? We already know that Judge Griesa dismissed the original complaint without reading it. Judge Griesa was not seeking amendment, since he already ignored the plaintiff's complaint, and the complaint that had not been read was dismissed with the judge's final order that the plaintiff start anew less his rightto amend.

Notwithstanding whether the order was final or not final, the plaintiff was deprived of his existence and right to a forum, and new rules of pleading

imperiously promulgated by Judge Griesa, in addition to his apparent ex-parte acceptance of summarized comments of opposing counsel, all certainly grounds for the instant appeal.

The plaintiffs are not asking for a second chance, the plaintiffs are asking for a first chance; they are asking for a judge who does not have ex-parte relationships with opposing counsel; they are asking for a judge who will read the complaint; they are asking for a judge who is fair, nothing more.

It must be understood at the outset that there was never a first complaint. It was as if the plaintiff submitted no complaint, as if there was no conference, as if there was no judge, and as if there was no plaintiff. The plaintiff was asked to amend something that was not even given existence.

Now, Mr. Horwitz also raised the same agrument that the order was not final. In support of Mr. Horwitz' argument that the order was not a final order, he states:

> "And for the plaintiff to contend that, "Judge Griesa dismissed (the matter)" without leave to amend defies credulity."

Mr. Horwitz further elaborates there can be no question the order is "non-final".

However, the accompanying opinion of Judge Griesa, dated February 2, 1983, refutes devense counsel's arguments that Judge Griesa's order was not final (intra 14A):

> JUDGE GRIESA: ". . . Both of these captioned actions are dismissed. The dismissal of these actions is final . . . there will be no leave to file any further amended complaint."

A court shouldnot be able to make rulings by successful guessing. To permit judges to merely look at the cover of a complaint, or the last page,

and just dismiss complaints arbitrarily, relying upon a Court of Appeals to either endorse the judge's guess or reverse it, would be a perversion of our judicial system, even if such guess were correct.

Furthermore, Judge Van Graafieland ruled that the order of Judge Griesa was not final and therefore not appealable (intra 17A) -- a decision totally opposite to that of Judge Griesa, who declared that the order was indeed final (intra 14A).

Point II(B)

Whether the Plaintiff's complaint did present cognizable causes of action

The facts as described by the plaintiffs in this matter show overwhelming support of the validity of the causes of action presented, and have provided far in excess of the standards of O'Brien v. Paddock, 246 Fed. Supp. 809 (D.C.N.Y. 1965), which held that a complaint is not subject to dismissal unless the plaintiff cannot prevail under any state of facts which might be proven in support thereof. The courts have taken a most lenient position regarding the upholding of complaints and have entertained motions to dismiss only when there were no facts which could be proven. Negoya Inc. v. Esquire Inc., 191 Fed. Supp. 379 (D.C.N.Y. 1965); K.S. Corp. v. Chemstrand Corp., 198 Fed. Supp. 310 (D.C.N.Y. 1961); Egelston v. State

University College at Genesco, 515 Fed. 2d 752 (1976).

> "Affording the complaints the favorable conspectus to which they are entitled, our review persuades us that the District Court acted prematurely in dismissing these actions and thus denying both plaintiffs the opportunity to establish their claims under the Civil Rights Act. . ." Weissman v. Lelandais, et al., 352 F.2d 358 (2d Cir. 1976)

> "Chief Justice Burgher wrote in Scheuer v. Rhodes, 416 U.S. 232, 236 (1974): "When a Federal Court reviews the sufficiency of a complaint before the reception of any evidence either by affidavit or by admissions, its task is necessarily a limited one. The issue is not whether the plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims. .. Moreover, it is well established that in passing on a motion to dismiss whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." (Weissman v. Lelandais et al., supra).

Furthermore, pleadings should not be dismissed if by any construction it states claim by which relief can be granted. Blazon Inc. v. Delock Gain Corp., 268 Fed. Supp. 416 (D.C.N.Y. 1965).

The plaintiff submits that his causes of action were legally sufficient, notwithstanding the liberal construction afforded to plaintiffs to enable the finding of causes of action. The plaintiffs' causes of action are meritorious without the benefit of favor.

Point II(C)

Whether largeness of a complaint is reason to dismiss a complaint

The defense claimed that plaintiff failed to comport with the requirements of F.R.C.P. 8(a)(e), therefore requiring that the plaintiff's complaint be dismissed with leave to amend.

Referring now to the cases cited by the defense, first Mr. Horwitz cited Koll v. Wayzata State Bank, 397 F.2d 124 (8th Cir. 1968), which he argued comports with the requirements of F.R.C.P. 8(a)(e) and cited a case where the plaintiff sought to establish that, ". . . the gold at Fort Knox is being feloniously transferred to New York where aliens are transporting it."

Notwithstanding the arguments and counter-arguments even in the matter of Koll v. Wayzata (supra), the court stated it would have permitted amendment had

the pleading been dismissed only for the rules established in F.R.C.P. 8(a)(e) and concluded it would be improper to dismiss it for that reason; but did dismiss that matter for failure to establish federal jurisdiction. Furthermore, this case was read by the judge who deliberated upon it.

Defense counsel quoted Crumpacker v. Civiletti, 90 FRD 126; but even in Crumpacker the judge read the complaint. And in Prezzi v. Berzak, 57 FRD 149, here again the case was read. And in Prezzi there was leave to amend the matters. And in none of these cases was the complaint dismissed because of its length. Length alone can never be a reason to dismiss a complaint.

Point III

Whether it is a violation of the appellants constitutional rights under the Due Process Clause of the Fourteenth Amendment to deny appellants counsel, court and legal disputation in the lower courts and force his claims, in effect, to be heard for the first time to the United States Supreme Court

The error of judgment and abuse of discretion in a judge not reading a complaint and refusal to read a complaint is a matter of judicial notice.

The taking of personal property and in the depriving of the plaintiff of his fundamental right to a family without an opportunity to be heard, without benefit of counsel (his own counsel), and without due process of law, deprives the plaintiff of life, liberty and property guaranteed by the Fourteenth Amendment of the Constitution of the United States.

Not reading and refusing to read the plaintiff's presentation; or the

perfunctory glance at one page of the plaintiff's presentation, or the basing of a decision on ex-parte and extra-judicial information regarding the plaintiff's complaint, is a substantial deprivation of the plaintiff's guaranteed rights provided by the Fourteenth Amendment to appear before an impartial justice and be afforded the right of counsel and due process of law. Judge Griesa denied the plaintiff his constitutional rights (intra 18A-26A).

Point III(A)

Judge Griesa deprived the plaintiff of his constitutional safeguards in dismissing the plaintiff's complaint which he admittedly did not read nor intend to read

Judge Griesa's dismissal of the plaintiff's complaint is a proper subject of appeal for this Supreme Court, in that Judge Griesa's order must be construed as a final order.

In Weissman v. Lelandais et al., 532 F. 2d 308 (2d Cir. 1976) it was held that orders of dismissal are final decisions within 28 U.S.C., § 1291, and are properly before this Court for review. Furthermore, it was held in Elfenbein v. Gulf & Western Industries Inc. et al., 509 F.2d 445 (9th Cir. 1978):

". . . If the District Court merely dismissed the complaint without comment, then the view, at least in this Circuit, is that

> the District Court intended to terminate the action and that the dismissal order is final."

Generally, an order which dismisses a complaint without prejudice is neither final nor appealable, because the deficiency may be corrected by the plaintiff without affecting the cause of action. Only if the plaintiff cannot amend or declares his intention to stand on his complaint does the order become final and appealable. Hurst v. California, 451 F. 2d 350 (9th Cir. 1971).

The point that most strongly asserts itself in Judge Griesa's dismissal of the plaintiff's complaint is that no reason was given by Judge Griesa, unless we consider the largeness of a complaint, or that numerous important defendants were required to answer the complaint, or most absurdly, that the judge did not read the complaint, as reasons. Judge Griesa, not unlike

Weissman v. Lelandais (supra), dismissed Yalkowsky's matter "without leave to amend."

Point III(B)

Judge Van Graafieland of the United States Court of Appeals, Second Circuit, did deny plaintiffs-appellants due process and counsel

Judge Van Graafieland's conduct in respect to the plaintiffs-appellants can be broadly described as oppressive, in that Judge Van Graafieland with full knowledge of plaintiff's surgery, scheduled oral arguments to be heard at times impossible for plaintiff to appear, and denied all motions with respect to efforts by plaintiff-appellant to seek redress. Indeed, the conduct of Judge Van Graafieland in this matter was extreme. It included placing another matter scheduled months in the future to be heard at the earlier time,

when it was impossible for the plaintiff-appellant to appear, in Judge Van Graafieland's diabolical lust to oppress the plaintiff-appellant -- all this hapening because the plaintiff-appellant dared to complain of corruption in the courts. The attached complaint to the Judicial Council more fully describes Judge Van Graafieland's denial of plaintiff-appellant's due process (Appendix B).

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

Dated: New York, New York

Respectfully submitted,

Stanley Yalkowsky

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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STANLEY YALKOWSKY, ANNA YALKOWSKY, PEREE YALKOWSKY, and ANNA YALKOWSKY, as Administratrix of the Goods, Chattels and Credits which were of MORRIS YALKOWSKY, Deceased; and Infants IRINA H. YALKOWSKY, RISAH SURAH YALKOWSKY and LARIN YALKOWSKY by STANLEY YALKOWSKY, their father and natural guardian,

Plaintiffs,

- against -

BENJAMIN SHEDLER, ALLEN H. WEISS, ALLEN J. KOZUPSKY, MARK ZAFRIN; SHEDLER, WEISS, KOZUPSKY & UNGER, a Law Partnership, SHEDLER, GROSSMAN, WEISS & KOZUPSKY, a Law Partnership; GROSSMAN, ZAFRIN, WEISS & KOZUPSKY, a Law Partnership; AMERICO NAPOLITANO, DEANNE NAPOLITANO (YALKOWSKY); HON. WILLIAM A. WALSH, GERALD STERN, ROBERT H. TEMBECKJIAN, FRANK CASTALDI, CARL A. VERGARI, JONATHAN FRIEDMAN, J. HENRY NEALE, JR., JOHN BRUNO, THOMAS C. KAVANAUGH, LORRAINE T. CELIO, RICHARD L. GERLOFF, JOHN BARRY, JOSEPH A. RICE, HON. MILTON MOLLEN, HON. GUY MANGANO, HON. VITO J. TITONE, HON. LEON LAZER, HON. DAVID T. GIBBONS, HON. MOSES M. WEINSTEIN,

Index No.
82C5665
TPG

ORDER

HON. JOHN P. COHALAN, HON. FRANK A. GULOTTA and IRVING SELKIN; SCARSDALE NATIONAL BANK AND TRUST COMPANY, IRVING BANK CORPORATION; MICHAEL GENTILE, JOSEPH ROSENBERG, KIM RINGLER, HON. RICHARD A. BROWN, HON. ISAAC RUBIN and HON. SEYMOUR BOYERS,

Defendants.

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Defendants having requested a conference with this Court for the purposes of discussing a motion to dismiss the complaint herein, and this Court having examined the complaint in the presence of counsel for all parties on October 4, 1982, it is hereby

ORDERED that the complaint in this action be and the same hereby is dismissed without prejudice to amending the complaint provided, however, that any such amended complaint be submitted to this Court for approval prior to service on any party hereto; and it is further

ORDERED that if any such amended

complaint is served on any party hereto prior to approval by this Court, each such party shall be relieved of any obligation it may have to respond in any manner to such amended complaint.

Dated: New York, New York
October 12, 1982

THOMAS P. GRIESA, U.S.D.J.

U. S. DISTRICT COURT

FILED

OCTOBER 15, 1982

S.D. of N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

STANLEY YALKOWSKY, ANNA YALKOWSKY, PEREE YALKOWSKY and ANNA YALKOWSKY as Administratrix of the Goods, Chattels and Credits which were of MORRIS YALKOWSKY, Deceased; and Infants IRINA H. YALKOWSKY, RISAH SURAH YALKOWSKY and LARIN YALKOWSKY by STANLEY YALKOWSKY, their father and natural guardian,

82 Civ. 5665

Plaintiffs,

- against -

BENJAMIN SHEDLER, ALLEN H. WEISS, ALLEN J. KOZUPSKY, MARK ZAFRIN; SHEDLER, WEISS, KOZUPSKY & UNGER, a Law Partnership; SHEDLER, GROSSMAN, WEISS & KOZUPSKY, a Law Partnership; GROSSMAN, ZAFRIN, WEISS & KOZUPSKY, a Law Partnership; AMERICO NAPOLITANO, DEANNE NAPOLITANO (YALKOWSKY); HON. WILLIAM A. WALSH, GERALD STERN, ROBERT H. TEMBECKJIAN, FRANK CASTALDI, CARL A. VERGARI, JONATHAN FRIEDMAN, J. HENRY NEALE, JR., JOHN BRUNO, THOMAS C. KAVANAUGH, LORRAINE T. CELIO, RICHARD L. GERLOFF, JOHN BARRY, JOSEPH A. RICE, HON. MILTON MOLLEN, HON. GUY MANGANO, HON. VITO J. TITONE, HON. LEON LAZER, HON. DAVID T. GIBBONS,

HON. MOSES M. WEINSTEIN, HON. JOHN P. COHALAN, HON. FRANK A. GULOTTA, and IRVING SELKIN; SCARSDALE NATIONAL BANK AND TRUST COMPANY, IRVING BANK CORPORATION; MICHAEL GENTILE, JOSEPH ROSENBERG, KIM RINGLER, HON. RICHARD A. BROWN, HON. ISAAC RUBIN and HON. SEYMOUR BOYERS,

Defendants.

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STANLEY YALKOWSKY,

Plaintiff,

- against -

82 Civ. 8748

J. HENRY NEALE, JR., JOHN H. BARRY, RICHARD L. GERLOFF, FRANK M. HEADLEY, JR., PAUL W. KNAPLUND, JULES BACKMAN, JACKSON B. BROWNING, RAYMOND J. CANTWELL, DOROTHY V. GRIFFIN, JOHN W. JOHNSON, JR. IRVING J. KERN, GEORGE C. LAWRENCE, BETTY MENKE, S. J. SCHULMAN, ALFRED P. SLANER, THOMAS C, KAVANAUGH, LORRAINE T. CELIO, SCARSDALE NATIONAL BANK AND TRUST COMPANY, HON. WILLIAM A. WALSH, JONATHAN FRIEDMAN, AMERICO NAPOLITANO and DEANNE NAPOLITANO, BENJAMIN SHEDLER and ALLEN WEISS,

Defendants.

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OPINION

GRIESA, J.

This action was originally filed as 82 Civ. 5665 under the caption Yalkowsky v. Shedler, et al. Plaintiff appeared pro se. However, he is an attorney. At a conference on October 4, 1982, held on the record, I dismissed the complaint for failing to comply with the rules of pleading in the federal courts. That complaint contained 755 paragraphs and 18 exhibits. It was a discursive mass of narrative, and obviously included a great bulk of extra eous matters. The action was directed against a large number of defendants, who had been served and had been burdened with the need to appear in court. The suit, as filed, was simply an abuse. In dismissing the complaint, I granted plaintiff leave to file an amended complaint. However, I directed that the amended complaint should be

submitted to me for review before any service was made upon any defendant. An order embodying the October 4 ruling was signed October 12, 1982.

Plaintiff has sought to evade these directions. Instead of filing an amended complaint, he filed what purported to be a new action. It was given the docket number 82 civ. 8748 in the Clerk's office and was assigned to Judge Stewart. It was captioned Yalkowsky v. Neale, et al. The complaint in 82 civ. 8748 names many of the same defendants as in 82 civ. 5665.

The so-called second action, 82 civ. 8748, has now been transferred to me.

The new complaint has 245 paragraphs. Again, it is a rambling document full of material which has no proper place in a pleading. However, it is possible to discern the nature of the claims. It is evident, upon analysis, that the complaint fails to state any

valid claim cognizable in a federal court.

The ensuing discussion will relate to this second complaint, 82 civ. 8748. It purports to allege claims under three federal statutes -- 12 U.S.C. § 7.5225, 12 U.S.C. § 7.5225 and 42 U.S.C. § 1983. With regard to the second of these, there is no such statute. Presumably plaintiff intends to refer to a regulation 12 C.F.R § 7.5225. In addition to referring to these specific federal laws, the complaint refers vaguely to other unspecified federal statutes. Also, there are numerous claims which do not even purport to fall under federal law, and would be state law claims, if they were colorable claims of any kind.

The action arises out of a contested divorce proceeding in Supreme Court, Westchester County, which took place in 1981 between plaintiff and

defendant Deanne Napolitano, plaintiff's former wife. Defendant Walsh was the justice who presided. Defendants Shedler and Weiss are attorneys who represented Deanne Napolitano. Defendant Americo Napolitano testified on behalf of Deanne Napolitano, and subsequently married her. Defendant Scarsdale National Bank ("SNB") was subpoenaed by plaintiff in the divorce proceeding to provide certain information. Also, it is alleged that SNB held $3,000 in trust for plaintiff's daughter and improperly paid this money out. Defendant Neale represented SNB in connection with the divorce proceeding subpoena. Other defendants are directors of SNB.

Plaintiff alleges that there was a conspiracy by defendants to deprive him of a fair trial in the divorce proceeding by concealing his wife's assets, thereby resulting in requirements of higher

alimony and child support payments than would otherwise have been imposed. Among other things, plaintiff alleges that SNB had documents showing assets of his wife over and above what she admitted, and that SNB failed to produce these documents pursuant to subpoena.

Plaintiff alleges that there was a fund created by court order in the settlement of an unrelated personal injury action involving his daughter Peree. Plaintiff alleges that the fund was supposed to be deposited at Eastern Savings Bank and that withdrawals were to be made only under court order. It is alleged that his wife improperly deposited with SNB and later drew the money out without proper authorization. The complaint alludes to a state court proceeding against SNB to have the funds restored, but the complaint does not discuss the outcome of this proceeding.

The complaint states no valid claim under any federal law. With regard to the possible state law claims, there is no diversity of citizenship, therefore there is no jurisdiction over the state law claims.

One of the federal statutes referred to in the complaint is 12 U.S.C., 93. It is alleged that this statute is the basis for holding the SNB directors liable for the alleged wrongful payment of the $3,000 account. Section 93 provides that if the directors of any national bank shall knowingly violate, or knowingly permit a violation of "this chapter," the franchise of the bank shall be forfeited; and the Comptroller of Currency may sue to dissolve the bank. The statute also provides that, in cases of violation, every director who has participated in or assented to such violation, shall be liable for the

damages which the bank, its shareholders, or any other person has sustained.

This statute has no application to anything raised in the complaint in this action. "This chapter" refers to Chapter 2 of The National Bank Act. The provisions of Chapter 2 refer to the organization, capitalization, dissolution and other matters affecting the basic structure of a national bank. Chapter 2 does not cover claims on behalf of the beneficiary of a deposit, with regard to a particular account.

The complaint also appears to allege that the handling of the $3,000 account violated 12 C.F.R. § 7.5225. This regulation requires that an immediate written report be made to federal officials regarding thefts, embezzlements and other defalcations. This regulation provides no basis for any cause of action alleged in the present complaint.

The complaint also alleges the right to recover under 42 U.S.C. § 1983 for an alleged conspiracy among defendants to deprive plaintiff of due process in his divorce proceedings. Aside from other infirmaties, it is the law that defendant Walsh, as a justice of Supreme Court, Westchester County, is immune from suit under § 1983. Pierson v. Ray, 386 U.S. 787 (1966); Heimbach v. Village of Lyons, 597 F.2d 344 (2d Cir. 1979). The other defendants are private parties who cannot be sued under § 1983. The fact that some of them participated in a state court proceeding as a party or witnesses does not subject them to suit under the statute. Russel v. Town of Mamaroneck, 440 F. Supp. 607 (S.D.N.Y. 1977); Gras v. Stevens, 415 F. Supp. 1148, 1152 (S.D.N.Y 1976); Stambler v. Dillon, 302 F. Supp. 1250, 1255 (S.D.N.Y. 1969).

For the foregoing reasons, both of the captioned actions are dismissed. The complaint in Yalkowsky v. Shedler, et al. (82 civ. 5665) was dismissed pursuant to the order of October 12, 1982 and no amended complaint in that action was filed. The complaint in Yalkowsky v. Neale, et al. (82 civ. 8748) is dismissed for the reasons set forth in this opinion. The dismissal of these actions is final. There will be no leave to file any further amended complaint.

So ordered.

Dated: New York, New York
February 2, 1983

THOMAS P. GRIESA, U.S.D.J.

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of June, One Thousand Nine Hundred and Eighty-three.

PRESENT:

HON. ELLSWORTH A. VAN GRAAFIELAND
HON. LAWRENCE W. PIERCE
HON. JOHN MINOR WISDOM*
Circuit Judges

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STANLEY YALKOWSKY, ANNA YALKOWSKY, PEREE YALKOWSKY, and ANNA YALKOWSKY as Administratrix of the Goods, Chattels and Credits which were of MORRIS YALKOWSKY, Deceased; and Infants IRINA H. YALKOWSKY, RISAH SURAH YALKOWSKY and LARIN YALKOWSKY by STANLEY YALKOWSKY, their Father and Natural Guardian,

ORDER
82-7845

Plaintiffs-Appellants,

v.

BENJAMIN SHEDLER, ALLEN H. WEISS, ALLEN J. KOZUPSKY, MARK ZAFRIN; SHEDLER, WEISS, KOZUPSKY & UNGER, a Law Partnership; SHEDLER, WEISS, KOZUPSKY, a Law Partnership; SHEDLER, GROSSMAN, WEISS & KOZUPSKY, a Law Partnership;

GROSSMAN, ZAFRIN, WEISS & KOZUPSKY, a Law Partnership; AMERICO NAPOLITANO, DEANNE NAPOLITANO (YALKOWSKY); HON. WILLIAM A. WALSH, JR., GERALD STERN, ROBERT H. TEMBECKJIAN; FRANK CASTALDI, CARL A. VERGARI, JONATHAN FRIEDMAN, J. HENRY NEALE, JR., JOHN BRUNO, THOMAS C. KAVANAUGH, LORRAINE T. CELIO, RICHARD L. GER[illegible]F, JOHN BARRY, JOSEPH A. RICE, HON. MILTON MOLLEN, HON. GUY MANGANO, HON. VITO J. TITONE, HON. LEON LAZER, HON. DAVID T. GIBBONS, HON. MOSES M. WEINSTEIN, HON. JOHN P. COHALAN, HON. FRANK A. GULOTTA and IRVING SELKIN; SCARSDALE NATIONAL BANK & TRUST COMPANY, IRVING BANK CORPORATION; MICHAEL GENTILE, JOSEPH ROSENBERG, KIM RINGLER, HON. RICHARD A. BROWN, HON. ISAAC RUBIN and HON. SEYMOUR BOYERS,

Defendants-Appellees.

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Stanley Yalkowsky, et al. appeal from an order of the United States District Court for the Southern District of New York (Griesa, J.), dated October 12, 1982, dismissing their complaint for failure to comply with the pleading requirements of Fed. R. Civ. p. 8.

The order granted leave to amend the complaint provided that the amended complaint be submitted to the district court for its approval prior to its being served. The order was not final and therefore is not appealable. Kozemchak v. Ukranian Orthodox Church of America, 443 F.2d 401 (2d Cir. 1971)

The appeal is dismissed with double costs against appellant Stanley Yalkowsky allowed the briefing appellees.

Hon. Ellsworth A. Van Graafieland

Hon. Lawrence W. Pierce

Hon. John Minor Wisdom

Filed: June 17, 1983
A. Daniel Fusaro, Clerk
United States Court of
Appeals, Second Circuit.

. . . constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cired or otherwise used in unrelated cases before this or any other court.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

YALKOWSKY,	)	
	)	82 Civil
vs.	)	5665 (TPG)
	)	
SHEDLER, et al,	)	

Before:

Hon. Thomas P. Griesa

District Judge

New York, N.Y.

October 4, 1982
10:00 A.M.

Appearances:

Stanley Yalkowsky, Esq., and
Peree Yalkowsky, Plaintiffs
Appearing Pro Se

Donald Goldberg, Esq.,
Attorney for Defendants Americo
and Deanne Napolitano

Winthrop, Stimson, Putnam &
Roberts, Esqs.,
Attorneys for Defendant Irving
Bank Corp.
By: Robert J. Sussman, Esq.
of counsel

Robert Abrams, Esq.
New York Attorney General
Attorney for Judges of the
Appellate Division, Stern, et al

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Appearances Continued:

By: Frederic Lieberman, Esq.
Assistant Attorney General

Kenneth Horwitz, Esq.
Attorney for Benjamin Shedler,
Weiss, Kozupsky, Zafrin, Unger
and Law Partnership

Semel, McLaughlin, Boockmann &
Skydel, Esqs.
Attorneys for Defendant
Castaldi, Vergari & Friedman
By: Louis J. Schepp, Esq.
of counsel

THE COURT: As I understand it, the object of this action is to remove certain matters from state courts to the federal court, right?

MR. YALKOWSKY: Yes, that's one aspect of it.

THE COURT: The prayer for relief after paragraph 755, that's what it says: "Wherefore, plaintiff begs this federal court, Southern District, to remove matters described and pending in the

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state courts to this federal court."

Is there any other prayer for relief in the complaint?

MR. YALKOWSKY: Just that there is an action for damages.

THE COURT: Where is the prayer for relief on that?

MR. YALKOWSKY: I believe --

THE COURT: Do you have a copy of the complaint?

MR. YALKOWSKY: Yes, I have.

THE COURT: Do you have a copy of the complaint?

MR. YALKOWSKY: Not with me right now, your Honor.

THE COURT: Is there any prayer for relief for damages?

MR. YALKOWSKY: Yes, sir, I believe there is, your Honor.

MR. HORWITZ: Yes, there is some prayer for relief, about $50 million

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in one section and $25 million in another.

THE COURT: I never read that.

MR. HORWITZ: I have, your Honor. But I would have to look through it. I don't know the page.

THE COURT: Do you have a copy?

MR. HORWITZ: You are looking at my copy right now.

THE COURT: Why don't you take it and find it.

MR. SUSSMAN: Your Honor, the prayer for relief for the complaint starts at paragraph 659. Two pages later there is a motion for removal from state court, and the prayer for relief which you refer to, your Honor, is at the end of paragraph --

THE COURT: I see. I got it. So there is one document that ends at paragraph 659 followed by a prayer for relief, and then there is a motion for

jg

removal from state court.

I would say on my own motion that the Court cannot entertain this complaint. It in no way complies with the rules of our court. No party should be required to answer this document. No court should be required to entertain any litigation based on such a document.

Are you an attorney?

MR. YALKOWSKY: Yes, I am.

THE COURT: It is out of the question. The document just speaks for itself.

MR. YALKOWSKY: May I respond, your Honor?

THE COURT: Yes.

MR. YALKOWSKY: Considering that your Honor just stated before he spoke that he didn't read the document, I would think that would be somewhat unfair of your Honor to state so.

jg

THE COURT: I'll be very frank with you. I don't intend to read it, and that's the thing: that a complaint should not be a long, long narrative with allegations of evidence, allegations of minute facts, essay, description, dialogue, etc., etc.

I read pleadings when the pleadings are before me in some proper manner. But this would take hours upon hours to read and figure out. It is not my burden to do that. No attorney, no defense attorney or defendant should be required to make his way through this. We should not have a litigation where on the basis of this kind of a thing a host of attorneys are crowded into this room, as they are today. Maybe the word "host" is a little exaggeration, but a lot of lawyers have come here because either they or their clients have been sued.

jg

And it will go no further.

The action is dismissed and I'll enter an order to that effect.

MR. YALKOWSKY: With thirty-five or so defendants, and considering the number of acts, it would be required to have a document of that size to explain all that has happened.

THE COURT: No.

MR. YALKOWSKY: And your Honor is just taking away my just right to appear in court?

THE COURT: If you read the Federal Rules, and if you want to -- frankly, I have no confidence that you will file an amended complaint that really is -- if you filed this, I have no confidence that you know how to file a proper complaint.

But certainly, I will permit you to try. This complaint is dismissed

jg

with leave to submit to the Court, before service on any party, a proposed amended complaint. But I direct you that you are not to serve any party with the amended complaint until I approve it. I am not going to have lawyers, banks, judges all over town served with process in this action, required to come in, required to set up files, required to respond to a document like this.

I will screen it first. No party is required to take any further steps whatever. The action is dismissed and terminated entirely with leave on your part to submit to the Court a proposed amended complaint. And until that time no party, no defendant has any obligation to take any steps whatever. The action is dismissed.

The only thing I would appreciate, I guess I am requiring one thing,

jg

is that one of the defendants submit to me for signature a very short order dismissing the complaint. If you have any difficulty, get the transcript of what I've said and just embody what I've said in an order.

MR. HORWITZ: Sure.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 30, 1981

HON. MILTON MOLLEN, Presiding Justice
HON. JAMES D. HOPKINS)
HON. DAVID T. GIBBONS) Associate Justices
HON. MOSES M. WEINSTEIN)

----------X

Stanley Yalkowsky,

Plaintiff,

Order

v.

Deanne Yalkowsky,

Defendant.

----------X

in the above entitled cause, the plaintiff having moved (1) to relieve Hon. William A. Walsh, Jr. as trial judge in the action now pending in the Supreme Court, Westchester County; and (2) direct that the plaintiff be permitted visitation forthwith with his two youngest children, in accordance with prior court orders; and the defendant having made a cross application for reconsideration of the decision on the appeal from an order of the Supreme Court, Westchester County, dated February 29, 1980, and this court's decision to dismiss the appeal from the trial court order dated on or about June 4, 1981;

Now, upon the papers filed in support of and in opposition to the motion, and cross application, and the motion and cross application having been duly submitted and due deliberation having been had thereon, it is

ORDERED that the motion and cross application are hereby denied in all respects.

Enter: Irving N. Selkin
Clerk of the Appellate Division

js

No. 4096 Stanley Yalkowsky, plaintiff v Deanne Yalkowsky, defendant.

Motion by plaintiff, (i) to relieve Hon. William A. Walsh, Jr., as trial judge in the action now pending in the Supreme Court, Westchester Court; and (2) direct that the plaintiff be permitted visitation forthwith with his two youngest children, in accordance with prior court orders.

Cross application by defendant for reconsideration of the decision on the appeal from an order of the Supreme Court, Westchester County, dated February 29, 1980, and of this court's decision to dismiss the appeal from the trial court order dated on or about June 4, 1981.

Motion and cross application denied in all respects.

MOLLEN, P. J., HOPKINS, GIBBONS & WEINSTEIN, JJ., concur.

SHEDLER, WEISS & KOZUPSKY
Attorneys at Law
299 Broadway
New York, N.Y. 10007

212 962-1114

Tuxedo Office

BENJAMIN SHEDLER
ALLEN H. WEISS
ALLEN J. KOZUPSKY

Tuxedo Pharmacy Bldg.
Tuxedo, N.Y. 10987
914-351-5453

GEORGE S. FISHMAN
Counsel

Please Reply To: New York City Office

July 2, 1979

Richard D. Friedman, Esq.
Friedman, Friedman, Levy &
Bottiglieri, Esqs.
655 Madison Avenue
New York, New York 10021

Re: Yalkowsky vs. Yalkowsky

Dear Mr. Friedman:

I acknowledge receipt of your letter of June 29th check enclosed.

In order to keep the record straight, I have told you repeatedly over the telephone that we get no cooperation from Mr. Yalkowsky whatsoever. What is particularly bad, is that both he and the oldest daughter carry on a campaign of vilification against their mother whenever the two younger children are

there. Under these circumstances I don't think it appropriate that visitation be continued. I suggested therefore, that an application be made to the Court in order to straighten this matter out.

I trust you will guided accordingly.

Very truly yours,

BS/s

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
TRIAL/SPECIAL TERM, PART WESTCHESTER
COUNTY

Present:

HON. JOHN C. MARBACH
Justice

STANLEY YALKOWSKY,

Plaintiff,

- against -

DEANNE YALKOWSKY,

Defendant.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry upon all parties.

Index Number 11741, 1978

Motion Date August, 1978

Motion Cal. Number _____

Trial Cal. Number _____

The following papers numbered 1 to 10 read on this motion for pendente lite relief and cross-motion for visitation.

	Papers Numbered
Order to Show Cause - Affidavits	1-4

Notice of Cross-motion - Affidavits 5, 6
Answering Affidavits
Replying Affidavits 10
Affidavits
Filed Papers

Pleadings - Exhibits - Stipulations - Minutes 7-9

Upon the foregoing papers it is ordered that this motion and cross-motion are disposed of as follows:

Plaintiff is directed to pay to defendant as and for temporary alimony and child support the sum of $250.00 per week commencing August 18, 1978. Accrued arrears are to be paid within 20 days of service upon plaintiff of a copy of this order with notice of entry. Plaintiff is further directed to pay all reasonable expenses in connection with the marital home, including, but not limited to, mortgage payments, real estate taxes, hazard and fire insurance, fuel utilities, basic telephone, water and ground maintenance.

Counsel fees are awarded to defendant's attorney in the sum of $2,500.00 to be paid by plaintiff within 20 days of service upon him of a copy of this order with notice of entry and the balance when the case is first placed on this Court's ready calendar, with leave to apply to the trial court for a further allowance.

Exclusive possession of the marital

(turn to page 2)

residence is denied, but the parties are directed not to annoy, harass, disturb or be offensive to each other and the children of the marriage.

The cross-motion is granted and plaintiff is awarded temporary visitation, away from the marital residence, in accordance with the Schedule incorporated in the affidavit in support of the cross-motion.

Dated: WHITE PLAINS, NEW YORK
August 23, 1978

JOHN C. MARBACH, J.S.C.

FILED

Entered: Aug. 24, 1978
George R. Morrow
County Clerk
County of Westchester

Shedler, Weiss, Kozupsky & Unger, Esqs.
Attorneys for Defendant
299 Broadway
New York, N.Y. 10007

Martin J. Rosen, P.C.
Attorney for Plaintiff
175 Main Street
White Plains, New York 10601

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
----------X

STANLEY YALKOWSKY,

Plaintiff,

Index No.
11741/78

- against -

DEANNE YALKOWSKY,

FILED
JAN. 8, 1979

Defendant.
----------X

HON. WILLIAM A. WALSH, JR.

Defendant moves to adjudge plaintiff in contempt for his failure to comply with the financial provisions of the pendente lite order dated August 23, 1978, to adjudge him in contempt for disobeying the direction contained in that order that the parties not harass, annoy or disturb one another, for leave to enter a money judgment and for counsel fees on the motion. Plaintiff cross-moves to deny the motion, to adjudge defendant in contempt for violating the pendente lite order by not affording

plaintiff his visitation rights, to suspend alimony payments for denying such visitation, for temporary custody of the minor children, and for an award of counsel fees.

A proceeding by writ of habeas corpus instituted by defendant in New York County was referred to this court by order dated December 20, 1978.

The branch of the motion for contempt in failing to pay alimony, child support and other expenses is denied inasmuch as those provisions of the pendente lite order are otherwise enforceable (Section 245, Domestic Relations Law).

Defendant is granted leave to enter money judgment against plaintiff in the amount of $735.00, representing arrears of alimony and child support to and including November 10, 1978.

In all other respects the motion is referred to the trial court for determination.

The cross-motion is referred to the trial court for determination.

The proceeding brought on by writ of habeas corpus is dismissed. The pendente lite order of August 23, 1978 made no custody award. Consequently, the father is co-custodian of his children. The fact that they are residing with him at the present time does not constitute unlawful detention.

Submit order on notice.

Dated: January 4, 1979
White Plains, New York

J.S.C.

H

FOURTEENTH: That subsequent to the unanimous jury verdict in favor of plaintiff in March of 1981, plaintiff advised Judge Walsh that on the next court appearance on May 18, 1981 we would request the Court to direct interim visitation. That on May 18, 1981 Judge Walsh stated informally in open court that it was his position that no visitation would be had until plaintiff paid defendant some money. That this statement was made despite the reference to him of these issues for a hearing based upon evidence and testimony. Ultimately, on June 1, 1981, when Judge Walsh granted defendant's application to permit the appeal of his denial of the mistrial motion, your deponent again raised said issue. In response to Judge Walsh's stated position, your deponent on pages 39-40 advised Judge Walsh of the following:

"The problem is this: until this issue is resolved [Judge Walsh's allowing defendant to appeal the motion for mistrial] we have to wait until that issue even to get temporary visitation. Mind you, this lady doesn't have the lawful custody of those children, there has been no temporary order awarding her custody, it is a mutual custody or joint, and we have refrained from physically taking the law into our own hands and removing the children from the house.

THE COURT: Counsel, you didn't hesitate to take the law into your own hands and comply with the order.

MR. FRIEDMAN: We did comply with the order.

THE COURT: We are clouding up the record.

MR. FRIEDMAN: All I want you to do Judge, is give me a little bit of equity here, give me a day's visitation. Let him say hello to these children.

THE COURT: Counsel, I appreciate your emotional appeal; I am not going to grant it. Take an immediate appeal from this order which Mr. Totero will give you a copy of so there won't be any delay. If you want to take an appeal immediately, if they want to sign a writ or an order, it will have to be followed through."

That as is evident, not only has Judge Walsh's commentary indicated his forgetfulness concerning whether plaintiff in fact did comply with the prior Order of Judge Walsh, dated April 30, 1979, but Judge Walsh has essentially stated that he will do nothing concerning the continued willful denial by defendant of plaintiff's visitation with his two daughters, unless pplaintiff pays money. The very issues of payment, arrears and willful interference with visitation of defendant have already been determined by Judge Walsh without benefit of a hearing, which he has been mandated to conduct. Plaintiff foresees, by Judge Walsh's statements, the prejudgment by him of these issues.

FIFTEENTH: That additionally, since the net result of Judge Walsh's determinations is the continued denial to

plaintiff of any visitation with his two youngest children, we respectfully request that visitation be ordered forthwith by this Court. That as Professor Seigel states at page 757 of New York Practice:

> "The rule of thumb about motions in an appellate court can be derived from the motion practice at trial level; any incidental order that the court has the power to make can be moved for by an interested party."

That corresponding to the broad general powers of this Court, CPLR § 7002(b)(2) grants this Court the specific power to determine a writ of habeas corpus, which, by analogy, encompasses all the relevant issues raised herein.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
----------X

STANLEY YALKOWSKY,

Plaintiff,

Index No.
11741/78

- against -

DEANNE YALKOWSKY,

Defendant.
----------X

HON. WILLIAM A. WALSH, JR.

This motion was fully submitted to the justices presiding in Special Term Part V on the 14th day of August, 1981, and referred to the undersigned on the 26th day of August. There are four prayers for relief contained in the petition.

First, "relieving the Honorable William A. Walsh, Jr. as trial judge in this action and referring its continuation to another judge of concurrent jurisdiction." This application is denied as it has been in open court and

in prior motions when made to this court and the Appellate Division.

Second, directing that the plaintiff movant be permitted visitation forthwith with his two youngest children in accordance with prior court orders. This matter has also been before this court and will be finally decided after the issues relating to custody have been fully litigated.

Third, changing the place of trial of this action from the County of Westchester, pursuant to Section 510 of the Civil Practice Law and Rules, upon the grounds that there is reason to believe that an impartial trial cannot be had in the County of Westchester. This application is denied as no proof has been submitted that such an impartial trial cannot be conducted.

Fourth, permitting the plaintiff to counterclaim for the return of counsel

fees fraudulently obtained by defendant's attorneys. The granting of this application would be improper as the attorneys are not parties to this action and a separate action to litigate that question will have to be brought.

This action has been pending for nearly three years and most of the delays have been caused by the numerous appeals which the plaintiff has taken and adjournments requested by his attorneys. In fact, this motion was returnable before the Court on the 7th day of August, 1981, and at the plaintiff's request was adjourned to August 14th so that he could submit additional papers.

I wish to assure both parties to this action it is my opinion that the trial of the action should not be completed by another justice of this Court as many of the facts whish will be considered in connection with the award

of custody of the children will have to be based, at least in part, upon evidence produced during the first phase of the trial. As with any experienced trial judge, I believe that I am capable of proceeding with an open mind and making a determination upon the evidence and the law and not be influenced by any other factors.

The remaining issues to be determined include the question of custody of the children and financial arrangements for their support in the event that the need for such an award is indicated as well as the matters referred to me by the Appellate Division by their decision dated March 31, 1981.

The first available date for the continuation of the trial, because of prior assignments, will be Monday, November 2, 1981, at Special Term Part V of this Court at 9:30 A.M., for which

time this matter is set down pre-emptorily. The parties are directed to be fully prepared to try the case to conclusion and are directed to complete any discovery or disclosure proceedings before said trial date.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
August 29, 1981

_____
J.S.C.

Nos. 83-376 and 83-433

Office-Supreme Court, U.S.
FILED
OCT 6 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STANLEY YALKOWSKY, *et al.*,

Petitioners,

—against—

BENJAMIN SHEDLER, *et al.*,

Respondents.

STANLEY YALKOWSKY,

Petitioner,

—against—

J. HENRY NEALE, JR., *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IRVING BANK CORPORATION, JOHN H. BARRY AND JOSEPH A. RICE IN OPPOSITION

ROBERT J. SUSSMAN
Winthrop, Stimson,
Putnam & Roberts
40 Wall Street
New York, New York 10005
(212) 943-0700

Counsel for Respondents
Irving Bank Corporation,
John H. Barry and
Joseph A. Rice

QUESTION PRESENTED FOR REVIEW

Was the United States Court of Appeals for the Second Circuit correct in affirming the dismissal, without leave to amend, of a 189 page pro se complaint (which contains vague and conclusory allegations of wrongdoing, extensive narrative, over 50 pages of exhibits, a motion to transfer to federal court all proceedings filed in state court by the pro se petitioner, and scandalous and other extraneous matter) for violating Rule 8 of the Federal Rules of Civil Procedure after petitioner failed to file an amended complaint as directed by the district court's conditional order of dismissal, the appeal from which was dismissed as being non-appealable?

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IN THE
SUPREME COURT OF THE UNITED STATES

- -X

STANLEY YALKOWSKY, et al., :

Petitioners, :

-against- :

BENJAMIN SHEDLER, et al., :

Respondents. :

- -X

STANLEY YALKOWSKY, :

Petitioner, :

-against- :

J. HENRY NEALE, JR., et al., :

Respondents. :

- -X

ON PETITIONS FOR WRITS OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF RESPONDENTS
IRVING BANK CORPORATION, JOHN H.
BARRY AND JOSEPH A. RICE IN OPPOSITION**

STATEMENT OF THE CASE

A. Preliminary Statement.

This brief in opposition is submitted on behalf of respondents Irving Bank Corporation (a bank holding company headquartered in New York City),* Joseph A. Rice (President of Irving Bank Corporation) and John H. Barry (a Senior Vice President of Irving Bank Corporation). Respondents Irving Bank Corporation and Messrs. Rice and Barry are collectively referred to herein as "Irving".

Petitioners seek review of two related orders of the United States Court of Appeals for the Second Circuit entered in the Shedler and the Neale actions which resulted in the dismissal, pursuant to Rule 8 of the Federal

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* Irving Bank Corporation is a publicly held corporation. All of its domestic subsidiaries are wholly-owned except The Merchants National Bank and Trust Company of Syracuse (New York).

Rules of Civil Procedure, of the voluminous and rambling pro se complaint in Shedler.

As will be demonstrated herein, with respect to Irving, both petitions are completely frivolous and totally without merit.

The dismissals, both the conditional and the final, were based upon the inherent deficiencies of the Shedler complaint -- deficiencies which are readily apparent upon even the most cursory examination of the complaint and which were obviously apparent to the judges below.* Given petitioners' obvious failure to comply with basic federal pleading requirements, coupled with their refusal to comply with the district court's directions in Shedler, there

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* Although the Shedler complaint was submitted to the courts below, petitioners have apparently decided not to submit this rather voluminous document to this Court for examination. Had they done so, the nature and scope of the defects would have been crystal clear to the Court.

can be no question that the courts below were completely correct in dismissing the Shedler complaint.

Indeed, there is absolutely nothing about this case which warrants Supreme Court review: there is no conflict among the circuits; there are no important federal issues (constitutional or statutory) presented; and there are no important issues of statutory construction or interpretation presented.

To the contrary, the case involves the unequivocal failure of an attorney to comply with the federal rules of pleading. To the extent district and circuit courts have been faced with similarly defective pleadings, such pleadings have normally been dismissed (initially with leave to amend) for violating Rule 8 of the Federal Rules of Civil Procedure.

B. The Shedler Complaint.

Shedler is one of numerous state and federal suits and proceedings* instituted by Stanley Yalkowsky, an attorney appearing pro se, against Irving and Irving's wholly-owned subsidiary, Scarsdale National Bank and Trust Company and certain of its officers, directors and employees and its attorney (collectively referred to herein as "Scarsdale"), as well as a potpourri of other individuals, including Justices of the New York State Supreme Court and Appellate Division, the district attorney and assistant district attorney for Westchester County, numerous other state officials, Mr. Yalkowsky's ex-wife, her attorneys and her present husband.

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* According to papers filed by Mr. Yalkowsky in various state court proceedings, he has instituted over a dozen related suits and proceedings, many of which are against defendants named in Shedler.

Like the other suits and proceedings, Shedler grows out of a divorce action instituted by Mr. Yalkowsky against his ex-wife; and like the thrust of the other suits and proceedings, Mr. Yalkowsky seeks to attack judges, attorneys, state officials and anyone else who, in one way or another, became involved in his divorce action.

Although neither Irving nor Scarsdale was a party to Mr. Yalkowsky's divorce action, Scarsdale was drawn into it as a non-party witness and soon become embroiled in a discovery dispute with Mr. Yalkowsky. Irving was drawn into this matter solely because of its relationship with Scarsdale.

The complaint in Shedler is a long, rambling document which is approximately one inch thick and contains approximately 189 pages, including a five-page narrative introduction, over 50 pages of exhibits and a motion to transfer all of Mr.

Yalkowsky's pending state court suits and proceedings to federal court.

The complaint and motion portions of this document are in excess of 125 typewritten pages and contain over 750 paragraphs. Vague and conclusory allegations of fraud and other wrongdoing, often vitriolic and vituperative, are indiscriminately levelled at defendants and are scattered throughout the entire complaint without a clear indication of which allegations apply to which defendant or which defendant committed the particular acts complained of.

With respect to Irving, there is absolutely nothing in the Shedler complaint which links Irving to the sweeping and conclusory charges of wrongdoing; or which indicates which of the various allegations of wrongdoing, attributable to defendants generally, are directed at Irving; or which gives any basis whatsoever for

imputing the allegedly wrongful conduct to Irving; or which supports the conclusory allegations of fraud and conspiracy which are cavalierly bantered about in the complaint; or which ties Irving to the other defendants (other than Scarsdale). Indeed, if there is any commonality at all among the defendants, it would appear to be that they either dared to oppose Mr. Yalkowsky or acted contrary to his wishes -- action which is neither unlawful nor conspiratorial.*

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* Mr. Yalkowsky's penchant for attacking persons who do not accede to his demands is aptly illustrated by his unjustified attacks on Judges Griesa and Van Graafeiland. Mr. Yalkowsky has seen fit to include, in the Appendix to the petition in Neale, the text of documents and records relating to his complaints against these judges. Not only is such material irrelevant to the instant proceeding, but the disclosure of such material -- which is deemed to be confidential -- appears to be a clear violation of 28 U.S.C. § 372(c)(14).

Even where the Shedler complaint attempts to specifically discuss Irving and Scarsdale (identified in the table of contents as paragraphs 151-180 and 122-145, respectively), it totally fails to provide any notice of or basis for petitioners' federal claim against Irving. To the contrary, these paragraphs indicate that the gravamen of Mr. Yalkowsky's complaint against Irving is that Scarsdale allegedly failed to fully comply with several trial subpoenas served on it (but not Irving) during the course of Mr. Yalkowsky's divorce action; that Scarsdale allegedly mishandled two checks issued for the benefit of his daughter; and that liability should be imposed on Irving simply because Irving refused to accede to Mr. Yalkowsky's demand that it intervene on his behalf in his disputes with Scarsdale -- issues already

presented to and rejected by state courts.*

Why such conduct gives rise to a federal cause of action against Irving or entitles Mr. Yalkowsky and his parents and children to recover damages from Irving is not disclosed. Indeed, the Shedler complaint is devoid of any reference to specific federal laws or constitutional provisions which were allegedly violated by Irving or specific duties imposed by

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* Yalkowsky v. Yalkowsky, Index No. 11741/78 (Sup. Ct. Westchester Co. Order of Justice W. A. Walsh, Jr. dated October 15, 1981), aff'd as to Irving, 93 A.D.2d 834 (2d Dep't 1983); Yalkowsky v. Napolitano, Index No. 42060/82 (Sup. Ct. N.Y. Co. Order of Justice M. Rettinger entered December 28, 1982), aff'd as to Irving, 94 A.D.2d 683 (1st Dep't 1983), motion for leave to appeal pending.

In both cases, Irving successfully contended, inter alia, that it could not be held liable for not complying with trial subpoenas which were not addressed to it, which were not served on it and which did not seek documents or testimony from it; and, in any event, Mr.

(Footnote continued)

federal law or the constitution which Irving allegedly owed to Mr. Yalkowsky or his family members -- information which is unquestionably necessary for Irving to properly respond to the myriad of charges contained in the complaint.

Rather, after announcing that the district court has jurisdiction over the first cause of action (the only one directed at Irving) based upon 42 U.S.C. § 1983, petitioners broadly proclaim, at the end of page three of the introduction, that their complaint is "[g]rounded on the defendants' violation of all plaintiffs' constitutional rights and the defendants' interference with visitation and filial relationships." (Compl. p. III) (emphasis added).

(Footnote continued)

Yalkowsky could not pierce Scarsdale's corporate veil and impose liability on Irving for the alleged improper acts of its subsidiary.

Nowhere, however, does the Shedler complaint identify the provisions of the constitution or the constitutional rights which Irving has allegedly violated; and nowhere does the Shedler complaint identify the constitutional provision which gives rise to, or any federal statute which provides, a federal cause of action against a non-governmental entity (such as Irving) for the "interference with visitation and filial relationships" -- whatever that means in the context of this action against Irving.

Nevertheless, based upon these unspecified constitutional rights, petitioners claim they are entitled to recover $325 million in damages from Irving and the other defendants.

C. Proceedings Below.

On October 4, 1982, a pre-trial conference was held before Judge Griesa

of the United States District Court for the Southern District of New York. As the transcript of that conference indicates,* it was clear to Judge Griesa -- as it should be to anyone who peruses petitioners' complaint -- that it is an exceedingly voluminous and disjointed document.

Based upon his examination of the complaint, Judge Griesa correctly concluded that it violated federal rules of pleading. He thereupon orally dismissed petitioners' complaint but granted leave to file an amended complaint provided that it be submitted to him for approval prior to service.

The oral order was thereafter embodied in a written order dated October 12, 1982 ("October 12 Order"), the text of which is

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* The text of the transcript is included in the Appendix to the petition in Shedler at pp. 18A-26A.

included in the Appendix to the petition in Shedler at pp. 1A-3A. Significantly, in the October 12 Order, Judge Griesa specifically acknowledged that he had "examined the complaint in the presence of counsel for all parties" at the October 4 conference.

Mr. Yalkowsky thereafter pursued two separate but related courses of action: he appealed from Judge Griesa's conditional order and he filed another complaint entitled Yalkowsky v. Neale, et al., 82 Civ. 8748 (TPG) (S.D.N.Y.). The document is styled "Amended Complaint -- Plaintiff's Demand For Jury Trial;" was filed as a separate action; names some, but not all, of the defendants named in the Shedler action;* and is once again based primarily upon Scarsdale's alleged failure to comply with

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* Neither Irving Bank Corporation nor Joseph A. Rice were named as defendants in Neale.

the subpoenas served by Mr. Yalkowsky in his divorce action.

Because Neale was related to Shedler, it was transferred to Judge Griesa pursuant to the local rules of the United States District Court for the Southern District of New York.

In an opinion dated February 2, 1983 bearing the captions of both Shedler and Neale (the text of which is included in the Appendix to the petition in Shedler at pp. 4A-14A), Judge Griesa ordered that the complaints in both actions be dismissed without further leave to amend. Significantly, with respect to the Shedler complaint, Judge Griesa stated that it was a "discursive mass of narrative [which] obviously included a great bulk of extraneous matters," concluding that "[t]he suit, as filed, was simply an abuse." Id. at 6A.

Mr. Yalkowsky appealed from these orders as well.

On appeal, the issues were fully briefed, with Mr. Yalkowsky submitting lengthy memoranda in both cases. In addition, the complaints were submitted to the Second Circuit as part of the records on appeal.

The Second Circuit rejected Mr. Yalkowsky's contentions in both appeals. In an order dated June 17, 1983 bearing the Shedler caption (Appendix to Shedler petition at pp. 15A-17A), the Second Circuit dismissed the appeal from Judge Griesa's October 12 Order because it "was not final and therefore not appealable." However, in a second order of the same date bearing the Neale caption (Appendix to Neale petition at pp. 1A-3A), the Second Circuit, after acknowledging that Judge Griesa had dismissed both the Shedler action (referred to by its Southern District Docket No. 82 Civ.

5665) and the Neale action without further leave to amend, affirmed both dismissals "substantially for the reasons set forth by the district court in its several orders."*

For the reasons set forth below, both petitions should be denied.

ARGUMENT

I

PETITIONERS HAVE FAILED TO DEMONSTRATE ANY VALID BASIS FOR GRANTING CERTIORARI

Contrary to petitioners' assertions, the petitions with respect to the dismissal of the Shedler complaint do not present any issues of constitutional proportions and do not present any important issues of federal statutory construction

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* Although petitioners moved in both cases for rehearing, and suggested that the actions be reheard en banc, the Second Circuit denied the motions by order dated August 8, 1983.

or interpretation. Indeed, they do not present any important issues at all.

Rather, the sole question presented by the petitions herein is whether the dismissal pursuant to Rule 8 of the Federal Rules of Civil Procedure of a vague, conclusory, 189 page pro se complaint, which is replete with scandalous and other extraneous matter but which fails to provide adequate notice of the federal claims asserted, is worthy of Supreme Court review -- particularly where the courts below provided the opportunity to amend the fatally defective pleading but petitioners refused to do so.

There is no disagreement among the federal courts as to the propriety of dismissing a pleading (initially with leave to amend) which fails to comply with Rule 8's mandate that a complaint "be simple, concise and direct" and contain

a "short and plain statement" of the claims asserted.* Indeed, federal courts have not hesitated in dismissing pleadings which are excessively long; which contain extensive exhibits and appendices, detailed evidentiary matter and similar extraneous material; which are prolix and replete with argumentative, conclusory and scandalous matter; which fail to clearly specify the wrongful acts committed by, or the

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* Fed. R. Civ. P. 8 states in pertinent part:

> "(a) A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . .
>
> * * *
>
> "(e)(1) Each averment of a pleading shall be simple, concise and direct."

statutes or laws violated by, each defendant; and which are completely devoid of fundamental information necessary to frame a proper response.*

---

* Nevijel v. North Coast Life Insurance Co., 651 F.2d 671 (9th Cir. 1981) (48 page complaint plus 14 pages of addenda and 9 pages of exhibits); Agnew v. Moody, 330 F.2d 868 (9th Cir.), cert. denied, 379 U.S. 867 (1964) (55 page complaint plus exhibits); McCann v. Clark, 191 F.2d 476 (D.C. Cir.), cert. denied, 342 U.S. 872 (1951) (complaint filled 14 printed pages of record and contained scurrilous matter); Crumpacker v. Civiletti, 90 F.R.D. 326, 330 (N.D. Ind. 1981) (pro se complaint, which spanned 53 legal size pages and attacked 64 defendants, including federal judges, United States attorneys and financial institutions, was held to be "overly long" and "far beyond any reasonable length" and placed "'placed undue burden on court and counsel to determine how plaintiff is here and why'...."); Echols v. Voisine, 506 F.Supp. 15, 16 (E.D. Mich. 1981), aff'd without opinion, 701 F.2d 176 (6th Cir. 1982) (vague allegations of "ongoing violations of [pro se plaintiff's] civil rights, apparently in the form of an ever widening conspiracy to discriminate against him," originally set forth in a 45 page complaint but were reduced to 14 pages and 24 pages of attachments);

(Footnote continued)

Undeniably, the Shedler complaint, which suffers from virtually all of these defects, completely and utterly fails to comply with

(Footnote continued)

Boruski v. Stewart, 381 F. Supp. 529, 533 (S.D.N.Y. 1974) ("A prolix, confusing, redundant, protracted pleading such as the 125 page document herein is subject to dismissal under this Rule [8(e)(1)] on that ground alone."); Prezzi v. Berzak, 57 F.R.D. 149 (S.D.N.Y. 1972) (pro se complaint, which was 53 legal sized pages and included exhibits and motion papers, violated Rule 8); Johns-Manville Sales Corp. v. Chicago Title & Trust Co., 261 F. Supp. 905 (N.D. Ill. 1966) (single count complaint covering 39 pages and containing over 20 exhibits); Benner v. Philadelphia Musical Society, Local 77, 32 F.R.D. 197 (E.D. Pa. 1963) (26 page complaint); cf. Ausherman v. Stump, 643 F.2d 715 (10th Cir. 1981) (63 page complaint with 9 pages of attachments and containing a "rambling narration of a discord" between the parties, "commingled" causes of action and a table of contents, was held to violate Rule 8).

The following observation, set forth in Shakespeare v. Wilson, 40 F.R.D. 500, 502 (S.D. Calif. 1966), would appear to be particularly applicable to the case at bar:

> "This action, filed in pro. per., is a typical example of the

(Footnote continued)

Rule 8. The filing of an amended pleading, as directed by the district court, would have been the proper course to pursue. Instead, petitioners refused to comply with the district court's order and improperly sought appellate review, attacking, in the process, federal judges merely because they rendered adverse rulings. Such conduct, to quote Judge Griesa, is "simply an abuse."

(Footnote continued)

> kind of action being filed with increasing frequency under the provisions of the Civil Rights Act of 1871, 42 U.S.C.§§1981-1986. Having been defeated in state court proceedings and being unhappy and somewhat humiliated and frustrated by the results of such proceedings, these persons lash out at judges, attorneys, witnesses, court functionaries, newspapers and anyone else in convenient range, terming all of them corruptly evil and charging them with perjury and conspiracy in a last desperate effort to re-litigate the issues on which they have once lost and hoping to secure sizeable damages to boot."

Quite clearly, further review is neither necessary nor warranted in this matter.

II

IRVING IS ENTITLED TO DAMAGES PURSUANT TO SUPREME COURT RULE 49.2

Rule 49.2 states:

> "When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages."

As demonstrated above, it is unequivocably clear that the petitions in Shedler and in Neale (to the extent it is directed at the Shedler complaint) are completely frivolous and are totally without merit. Accordingly, Irving is entitled to recover damages incurred herein. Tatum v. Regents of the University of Nebraska - Lincoln, ____ U.S. ____, 103 S.Ct. 3084 (1983); cf. Gullo v. McGill, ____ U.S. ____, 103 S.Ct. 2445 (1983).

CONCLUSION

For the reasons set forth herein, the petitions for certiorari should be denied, and Irving should be awarded damages pursuant to Rule 49.2.

Respectfully submitted,

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Nos. 83-376, 83-433

IN THE

Supreme Court of the United States

October Term, 1983

No. 83-376

STANLEY YALKOWSKY, *et al.*,
Petitioners,

v.

BENJAMIN SHEDLER, ALLEN H. WEISS, ALLEN J. KOZUPSKY, MARK ZAFRIN; SHEDLER, WEISS, KOZUPSKY & UNGER, a Law Partnership; SHEDLER, WEISS & KOZUPSKY, a Law Partnership, *et al.*,
Respondents.

No. 83-433

STANLEY YALKOWSKY,
Petitioner,

v.

J. HENRY NEALE, JR., JOHN H. BARRY, RICHARD L. GERLOFF, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS SCARSDALE NATIONAL BANK AND TRUST COMPANY AND CERTAIN OF ITS DIRECTORS, OFFICERS AND EMPLOYEES

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Nos. 83-376, 83-433

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

STANLEY YALKOWSKY, et al.,

Petitioners,

v.

BENJAMIN SHEDLER, ALLEN H. WEISS, ALLEN J. KOZUPSKY, MARK ZAFRIN; SHEDLER, WEISS, KOZUPSKY & UNGER, a Law Partnership; SHEDLER, WEISS & KOZUPSKY, a Law Partnership; et al.,

Respondents.

STANLEY YALKOWSKY,

Petitioner,

v.

J. HENRY NEALE, JR., JOHN H. BARRY, RICHARD L. GERLOFF, et al.,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS SCARSDALE NATIONAL BANK AND TRUST COMPANY AND CERTAIN OF ITS DIRECTORS, OFFICERS AND EMPLOYEES

Respondents Scarsdale National Bank and Trust Company ("Scarsdale") and its directors, officers and employees (collectively referred to as the "Scarsdale Group") respectfully submit this brief in opposition to the petitions for writs of certiorari filed by plaintiff-petitioner Stanley Yalkowsky in the matters of Yalkowsky, et al. v. Shedler, et al. (No. 83-376) ("Shedler") and Yalkowsky v. Neale, et al. (No. 83-433) ("Neale").*

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* In Shedler, the Scarsdale Group, as named in the Complaint, consists of the following individual respondents in addition to Scarsdale: John Bruno, Thomas C. Kavanaugh, Lorraine T. Celio and Richard L. Gerloff.

In Neale, the Scarsdale Group, as named in the Complaint, consists of the following individuals in addition to Scarsdale: John H. Barry, Richard L. Gerloff, Frank M. Headley, Jr., Paul W. Knaplund, Jules Backman, Jackson B. Browning, Raymond J. Cantwell, Dorothy V. Griffin, John W. Johnson, Jr., Irving J. Kern, George C. Lawrence, Betty Menke, S. J. Schulman, Alfred P. Slaner, Thomas Kavanaugh and Lorraine T. Celio.

OPINIONS AND ORDERS BELOW

Petitioner seeks review in this Court of orders by the United States Court of Appeals for the Second Circuit rendered on June 17, 1983. Those orders are reproduced in Petitioner's Appendices (Shedler App. 15A; Neale App. 1A).

Petitioner has not reproduced the order by the Second Circuit dated August 8, 1983 which (a) denied petitioner's motion for reargument and (b) noted that no member of that Court had asked for a vote on petitioner's suggestion for rehearing in banc. One omnibus rehearing motion was made by Petitioner and decided below in both Neale and Shedler as well as a third companion case now also pending in this Court, Yalkowsky v. Mollen (No. 83-441). The Scarsdale Group is not a party to the Mollen action.

The Second Circuit and District Court decisions in Neale made it clear that Shedler and Neale were related, companion cases. Accordingly, the Scarsdale Group is submitting one brief to this Court in opposition to the petitions in both cases. The Second Circuit in Neale affirmed the opinion dated February 2, 1983 (Neale App. 4A) and a judgment dated and entered February 14, 1983 (Neale App. 28A) which were issued by United States District Court for the Southern District of New York and which dismissed the amended complaint in Neale ("Amended Complaint") with prejudice to filing any other amended complaint in either Neale or Shedler. In Shedler, the Second Circuit dismissed petitioner's appeal on the ground that the order appealed from, which had dismissed petitioner's complaint with leave to replead,

was not final and appealable. (Shelder App. 15A)

STATEMENT OF THE CASE

A. The Parties

Petitioner Stanley Yalkowsky is an attorney who is representing himself pro se in both Shedler and Neale. Between 1978 and 1981 Mr. Yalkowsky was involved in an apparently bitter divorce proceeding with his wife Deanne Yalkowsky (Napolitano). The judge and defense counsel in the divorce proceedings, as well as judges involved in many of his appeals, are defendants-respondents in either Shedler or Neale.

Dissatisfied with developments in his divorce proceedings, Mr. Yalkowsky has named all of these individuals as defendants in this action. Also named as defendants are Scarsdale upon which Mr. Yalkowsky had served subpoenae duces

tecum, some of its directors, officers or employees, its parent corporation, Irving Bank Corporation ("Irving") and its attorney.

B. Pleadings

Insofar as allegations against the Scardsale Group are concerned, the Amended Complaint in Neale was essentially a slightly edited rewrite of the original complaint filed in Shedler.* As we will discuss below, petitioner has numerous other similar related actions or proceedings pending in state and federal court.

The original complaint (Shedler) contained 755 paragraphs and 18 exhibits, was approximately 189 pages long and one

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* Petitioner has, inexplicably, not reproduced the pleadings in his appendices to this Court.

inch thick (Shedler 2d Cir. Rec.*). The complaint also sought removal of numerous state court actions to federal court. The complaint was dismissed without prejudice, but with leave to replead, by Judge Griesa on October 12, 1982 (See Shedler App. 1A-3A (order); 18A-26A (decision)). Rather than replead in that docket, Petitioner took an appeal. He also amended his complaint and attempted to use the Amended Complaint as a basis for commencing the Neale action. In so doing, plaintiff added some parties and dropped others.

The Amended Complaint was filed on December 30, 1982 (Neale 2d Cir. App. B 42). The Amended Complaint, like its predecessor, is extremely long, consist-

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* Reference to Petitioner's Appendices or Records on Appeal as filed with the Second Circuit will be cited herein as (Neale or Shedler 2d Cir. Rec. or App.).

ing of 245 rambling paragraphs. The Amended Complaint is, however, duplicative in every material respect of the Shedler complaint, at least with respect to allegations against the Scarsdale Group.

The gravamen of Mr. Yalkowsky's complaint against the Scarsdale Group is the claim that Scarsdale failed to fully comply with trial subpoenas duces tecum served on it during the course of Mr. Yalkowsky's divorce action in state court. The charges against the Scarsdale directors and officers are even more attenuated, since it seems that the essence of Mr. Yalkowsky's complaint is that they failed to take some undisclosed action well after the alleged failure to comply with the subpoenas. This discovery dispute is currently subject to further extensive litigation in the New York State courts.

Mr. Yalkowsky also appears to be complaining that Scarsdale and its tellers acted improperly in permitting his former wife to cash two checks which she had apparently altered or cashed without all proper endorsements. The face amount of the checks aggregated $3,100. Those checks were drawn by third parties in settlement of a personal injury action brought on behalf of Petitioner's daughter by Petitioner and her mother as guardians. Petitioner's daughter is now an adult who is also pursuing her claim in a New York State court proceeding. (See Neale 2d Cir. App. B 83)

Mr. Yalkowsky's amended complaint, while purporting to contain common law claims of fraud, deceit or negligence, refers to two federal statutes and one regulation but fails to state how the alleged conduct gives rise to a federal

cause of action against Scarsdale, its directors, officers or employees, or, for that matter, any of the other defendants. As set forth below, the federal statutory provisions clearly have no relation or applicability to the conduct alleged.

C. Related Litigation

As noted above, the actions on appeal are two of but numerous related actions or proceedings initiated by Mr. Yalkowsky and pending in various courts.

Yalkowsky v. Yalkowsky, Index No. 11741/78 (Sup. Ct. Westchester Co.).* At the heart of the many Yalkowsky federal and state actions, is the divorce action between Stanley and Deanne Yalkowsky,

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* This Court is asked to take judicial notice of these matters, all of which are matters of public record but not all of which are part of the records on appeal in these cases.

which is still subject to appeal on the merits. In September 1981, Mr. Yalkowsky moved, during the divorce action, to compel Scarsdale to comply with certain trial subpoenas duces tecum and to hold Scarsdale and certain of its officers and employees in contempt for failure to comply with the subpoenas.

In October 1981, Mr. Yalkowsky's motion to hold Scarsdale and its parent, Irving, in contempt and to compel compliance with his document requests was denied. Mr. Yalkowsky took an appeal from that decision. On April 11, 1983, the Appellate Division, Second Department of New York Supreme Court ("Second Department") issued a ruling affirming as to Irving and modifying the decision below to require Scarsdale to prepare and submit an affidavit specifying what information was provided, what information

it is willing to provide and what information it can or will not provide. 93 A.D.2d 834 (2d Dept. 1983).

Thereafter, Scarsdale complied with that order by submission of a lengthy affidavit and voluminous appendix. Dissatisfied with this affidavit, Mr. Yalkowsky moved the Second Department to hold Scarsdale and its affiant in contempt. That Court denied Petitioner's motion. Mr. Yalkowsky currently has pending (a) an appeal from that denial to the New York Court of Appeals, (b) a reargument motion to the Appellate Division and (c) an identical motion subsequently made to the lower court.

Scarsdale is also a respondent on an appeal to the Second Department from the denial of a subsequent motion by Petitioner during his divorce proceedings to hold Scarsdale and one of its officers in

contempt. Once again petitioner alleged in state court that Scarsdale contumaciously failed to comply with trial subpoenas duces tecum served on it.

However, on that appeal, the record is clear that Mr. Yalkowsky served those subpoenas on the penultimate day of a three week trial calling for production of all documents pertaining to numerous bank accounts over an eight-year period of time.* Moreover, on the first day of trial, the trial judge had warned Mr. Yalkowsky, who conducted that portion of the trial pro se, to issue new, proper subpoenas, to Scarsdale, but Mr. Yalkowsky waited three weeks to do so. Even when served, the subpoenas were techni-

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* That trial was the bifurcated second phase of Petitioner's matrimonial ltigation. Scarsdale was not called during the first phase although it was available for appearance, if needed, by telephone notice.

cally improper as they were unsigned and obviously burdensome on their face.

The trial judge, when alerted to this development, ruled against the subpoenas and, most importantly, during the trial Mr. Yalkowsky never called Scarsdale as a witness. Scarsdale's attorney appeared to contest the subpoenas after this series of events.

After the trial, Mr. Yalkowsky made the motion to hold Scarsdale and its officer in contempt; that motion was contested and denied on the merits. The order now subject to appeal was rendered on a motion made seven months after this denial. The issues on appeal, which has not yet been argued, are, therefore, whether the motion (a) was barred by the doctrine of res judicata or collateral estoppel; (b) was barred by the fact that Mr. Yalkowsky suffered no injury from

Scarsdale's alleged contempt since he had elected not to call it or its officer as a witness; and (c) should have been denied, in any event, since Scarsdale acted reasonably in response to the subpoenas.

Yalkowsky v. Napolitano, Index No. 42060/82 (Sup. Ct. N.Y. Co.), aff'd and app. dismissed, 94 A.D.2d 683 (1st Dept. 1983). In May 1982, Mr. Yalkowsky instituted a lawsuit in Supreme Court, New York County, against virtually the same group of defendants as in these cases. In the Napolitano action, Mr. Yalkowsky once again complained of Scarsdale's alleged non-compliance with the subpoenas and Irving's refusal to intervene in that dispute. The complaint also contains allegations relating to the alleged mishandling by Scarsdale of the two checks for the benefit of Mr. Yalkowsky's daugh-

ter. Irving moved to dismiss the complaint and its motion was granted in all respects. Scarsdale moved for clarification of the complaint and its motion was also granted. Mr. Yalkowsky appealed these rulings.

On May 24, 1983, the Appellate Division, First Department affirmed the dismissal of the complaint as to the Irving and state-official groups of defendants and dismissed the appeal from so much of the lower court order as directed Mr. Yalkowsky to replead as non-appealable. Mr. Yalkowsky sought and was denied reargument by the Appellate Division, and an appeal is now pending to the New York Court of Appeals.

Yalkowsky v. McPherson, Index No. 16411/74 (Sup. Ct. N.Y. Co.; Sup. Ct. Westchester Co.) (See Neale 2d Cir. App. B 83). In connection with the check

issues, Mr. Yalkowsky moved on behalf of his daughter, petitioner Peree Yalkowsky, to hold Scarsdale and certain of its employees in contempt for allegedly violating the court order settling the personal injury case. The proceeding is still being pursued by Peree Yalkowsky, pro se.

Yalkowsky v. Comptroller of the Currency, et al., 82 Civ. 4354 (RLC) (dismissed, S.D.N.Y. Mar. 15, 1983), app. pending, No. 83-6069 (2d Cir.) Mr. Yalkowsky sought a writ of mandamus directing the Comptroller of the Currency to forfeit Scarsdale's charter and an order directing the United States attorney to bring litigation against the Scarsdale Group. Judge Carter of the Southern District dismissed this complaint on March 15, 1983, and an appeal to the Second Circuit is now pending.

Yalkowsky v. Hon. Milton Mollen, et al., 82 Civ. 4611 (CES) (dismissed, S.D.N.Y. Feb. 17, 1983), aff'd, No. 83-7169 (2d Cir. June 17, 1983) pet. for writ of cert. pending, (No. 83-441). In this case Mr. Yalkowsky has sued numerous justices of the Appellate Division, Second Department and administrators of the Judicial Conduct Commission of New York State for failure to take disciplinary action against Justice Walsh. This complaint was dismissed by Judge Stewart, was affirmed by the Second Circuit and, as stated above, is now subject to a companion petition for a writ of certiorari to this Court.

In addition to actual litigation, Mr. Yalkowsky has filed grievances with various professional disciplinary committees and sought to invoke the involvement of various regulatory agencies (See Neale 2d Cir. App. 87-95).

In addition, in the instant petitions Mr. Yalkowsky has taken it upon himself to attack the conduct of Judge Van Graafieland of the Second Circuit and Judge Griesa of the Southern District of New York. These allegations as to Judge Griesa were entertained and denied by the Second Circuit in both the opinion below (Neale App. 1A-3A) and a subsequent proceeding initiated by Mr. Yalkowsky under 28 U.S.C. §372(c)(1) (Neale App. 60A) and, as to Judge Van Graafieland, denied in a subsequent proceeding under 28 U.S.C.§372(c)(1) (Neale App. 54A).*

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* It should not go unnoticed that Mr. Yalkowsky's outrageous conduct in this respect is consistent with the course of the entirety of the litigation in every court where he attacks all within reach. Moreover, Mr. Yalkowsky has violated 28 U.S.C. §372(c)(14) which requires that all such complaints and proceedings be sealed as to the identity of the judge. This misconduct is consistent

ftn. cont'd . . .

D. Prior Proceedings

As set forth above, when Judge Griesa dismissed the Shedler complaint on October 12, 1982, he directed plaintiff to submit any proposed amended complaint to him before service on any party so that he could approve it prior to service. (Shedler App. 1A-3A). Plaintiff took an appeal from that ruling but elected to amend the complaint under the guise of a new caption with a new docket number obtained by paying the requisite fee. The Second Circuit held that petitioner's appeal in Shedler should be dismissed as non-appealable and held in

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ftn. cont'd . . .

with Mr. Yalkowksy's violation of New York State laws which mandate that similar proceedings against attorneys or judges also not be revealed to the public unless disciplinary action is taken or the Court unseals the record. N.Y. Judiciary Law §§45 (judges), 90(10) (attorneys).

Neale that the appeal in that case included Shedler and that Judge Griesa had properly dismissed both cases.*

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* Petitioner's principal argument in Shedler appears to be that Judge Griesa should not have dismissed that complaint without reviewing it. At the outset, it should be observed that Judge Griesa examined the complaint and could easily and quite properly determine that its 189 pages, 755 paragraphs and voluminous exhibits could not, no matter how strained a reading were attempted, comply with Rule 8, Fed. R. Civ. P. that a complaint contain "a short and plain statement of the claim." Any argument by Petitioner that it was impossible for him to restructure the complaint is belied by his briefs to this Court and the Second Circuit wherein a much shorter exegesis has been attempted by Petitioner. Moreover, although Petitioner has inexplicably failed to present either the Shedler or Neale complaint to this Court, both Courts below had such documents in front of them when ruling on the matters. Thus, even if petitioner were correct that Judge Griesa erred by not reviewing the Shedler complaint in more detail, any such error was cured by his subsequent, exhaustive review of Neale and the Second Circuit's ability to review both complaints as part of the records on appeal.

The Amended Complaint (Neale) was filed on December 30, 1982 and submitted by plaintiff to Judge Griesa on January 3, 1983 (Neale 2d Cir. App. D 103). The case was transferred from Judge Stewart, to whom it had been assigned by virtue of the random assignment system of the Southern District of New York, to Judge Griesa by January 18, 1983 (Neale 2d Cir. App. D 110). Thereafter, Judge Griesa reviewed the entire Amended Complaint carefully and determined that the complaint failed to state any claim cognizable in a federal court (Neale App. 4A-14A).

At the outset, the Judge noted the above procedural history and ruled: "Plaintiff has sought to evade these directions. Instead of filing an amended complaint, he filed what purported to be

a new action." Judge Griesa concluded the opinion by ordering: "both of the captioned actions [Shedler and Neale] are dismissed. The dismissal of both actions is final. There will be no leave to file any further amended complaint." (Neale App. 14A) The appeal to the Second Circuit followed.

E. Summary of Background of Cases

Notwithstanding Petitioner's obvious efforts to contrive a federal or constitutional basis for pigeonholing extensive, continuing state court marital and discovery litigation, he simply cannot cram the facts of this case into a cognizable federal claim. Certainly, as is apparent, there is no reason for this court to exercise its certiorari jurisdiction in these cases.

Simply put, Petitioner's complaints involve his allegations of mishandling of

his divorce case in state court, a proceeding to which the Scarsdale Group was not party. Dissatisfied with the result there, he has sought retribution from all involved. As to the Scarsdale Group, however, it is clear that his allegations center on a discovery dispute under state procedures which is still winding its way through various levels of the state court system. To the extent he has pleaded the check issue (approximately $3,100 payable to his daughter allegedly mishandled by Scarsdale) his daughter is also pursuing her remedy in state court.

ARGUMENT

SUMMARY OF REASONS FOR DENYING THE WRITS

As is apparent from a review of the background of this matter, there is simply no special or important reason for this Court's review of the decisions below. Petitioner has asserted no such reason except to remonstrate in the most vague and conclusory terms. However, in order to put this matter in its proper perspective and to lay to rest Petitioner's arguments, the Scarsdale Group Respondents will briefly summarize below the prevailing, incontrovertible and uniform principles of federal law which, when applied to this case, mandate the conclusion that no cognizable federal claim was properly asserted by Petitioner below and that the procedural treatment of the cases below was proper in all respects.

I.
PETITIONER HAS NO CLAIM UNDER THE BANK ACT

Petitioner predicated subject matter jurisdiction on the purported violation by Respondents of §93 of the Bank Act, 12 U.S.C. §93.

A private right of action under 12 U.S.C. §93 has been permitted but only in cases (a) which involve violations of specific provisions of Chapter 2 of Title 12 and (b) only when the actions are brought by shareholders of the bank or by the bank itself. Harmsen v. Smith, 542 F.2d 496, 499-502 (9th Cir. 1976), after remand, 693 F.2d 932 (9th Cir. 1982).

Section 93 is, clearly, not intended to embrace any other chapter of Title 12, nor is it intended to embrace violations of any other federal or state law. Judge Griesa quite aptly synopsized the predominant reasons why Section 93 does not cover the claims at bar:

> This statute has no application to anything raised in the complaint in this action. "This chapter" refers to Chapter 2 of the National Bank Act. The provisions of Chapter 2 refer to the organization, capitalization, dissolution and other matters affecting the basic structure of a national bank. Chapter 2 does not cover claims on behalf of a depositor, or on behalf of the beneficiary of a deposit, with regard to a particular account. (Neale App. 12A)

To the extent that this section authorizes private rights of action, such a cause of action must allege a violation by the bank of the provisions of Chapter 2 of the Act. Thompson v. Kerr, 555 F.Supp. 1090, 1097 (S.D. Ohio 1982). In the case at bar, there are simply no such allegations.

Moreover, plaintiff lacks standing. The only parties having standing to sue under the statute have been held to be the bank itself suing an errant director (First National Bank of Lincolnwood v.

Keller, 318 F. Supp. 339 (N.D. Ill. 1970)); minority shareholders (Harmsen v. Smith, supra); and shareholders suing derivatively on behalf of the bank (Golar v. Daniels & Bell, Inc., 533 F. Supp. 1021 (S.D.N.Y. 1982); Seiden v. Butcher, 443 F. Supp. 384 (S.D.N.Y. 1978); Spalitta v. National Bank of New Orleans, 444 F.2d 291 (5th Cir.), cert. denied, 404 U.S. 883 (1971)). Each of these plaintiffs sued under a specific section of Chapter 2, charging specific defalcations of that chapter which resulted in damage to the bank itself and personal damage to plaintiff.

In the case at bar, not only is plaintiff not a shareholder, and, therefore, has no standing to sue, but plaintiff's complaint is essentially for a bank's handling of third party checks, an area governed by state law, and a bank's

response, as a non-party witness, to subpoena(s), an area exclusively governed by the law of the jurisdiction (here New York State) whose court issued the subpoena. In contrast, Petitioner, has not cited any specific violations of Chapter 2, nor could he. His claim falls directly under the prohibition of Golar v. Daniels & Bell, Inc., on issues traditionally and exclusively governed by state law, and, therefore, plaintiff has no right to a private cause of action under §93.*

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* Although referred to in his complaint, petitioner has eschewed reliance on 12 C.F.R. §7.5225 to validate a federal cause of action (Neale Pet. at 48-49).

II.
PETITIONER HAS NO COGNIZABLE CLAIM UNDER 42 U.S.C. §1983

Petitioner's Amended Complaint fails to state a claim under 42 U.S.C. §1983. Nowhere in the Amended Complaint is there an explicit allegation of a conspiracy in violation of Section 1983. Certainly no such allegation appears in the one paragraph which refers to that statutory provision (¶146) or with respect to the Scarsdale Group at all. Although paragraph 148 of the Amended Complaint states that Judge Walsh "acted in concert with Mrs. Yalkowsky and her attorneys and in concert with other defendants" (¶151), there is no specification of a conspiracy of the type contemplated by any case under §1983.*

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* The lack of specificity of any conspiracy also mandates dismissal of the Amended Complaint for failure to comply with Rule 9(b), Fed. R. Civ. P.

A similar failure in Shaffer v. Cook, 634 F.2d 1259 (10th Cir. 1980), cert. denied, 451 U.S. 984 (1981) resulted in the dismissal of an amended complaint. In a per curiam decision, the Tenth Circuit in Shaffer found that nothing in the complaint indicated that the Court or the attorneys "were acting outside the confines of the neutral function of a judicial forum." The Court further found that there was a failure to allege the kind of "conspiratorial nexus" between the judge and the attorneys that justified a cognizable §1983 claim. See also Jemzura v. Belden, 281 F. Supp. 200 (N.D.N.Y. 1968):

> There is abroad in the land a notion that the Civil Rights Act has vested in the federal courts the function of an Ombudsman -- to review any grievance, no matter how petty, stemming from the aggrieved

party's unsuccessful results in state court litigation. Nothing could be further from the Congressional purpose.

Paraphrasing Judge Waterman's apt observation in Powell v. Workmen's Compensation Board, supra, [327 F.2d] at 137 (applied to the instant case):

> "Indeed, were we to hold this complaint sufficient, we would be inviting every party to a state proceeding angered at [adverse results in marital litigation] to file a complaint in this court reciting the history of his state case and concluding with a general allegation of conspiracy." 281 F. Supp. at 207.

Plaintiff's complaint does not contain even a colorable claim under 42 U.S.C. §1983 and was properly dismissed on this ground.*

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* In Dennis v. Sparks, 449 U.S. 24, 27-28 (1980), the Court held that, while a judge was insulated by judicial immunity, private parties accused of conspiring with the judge need not necessarily be dismissed from a Section 1983 case. Nevertheless, the Court emphasized that "merely

ftn. cont'd . . .

III.
PETITIONER HAS NO BASIS FOR ATTACKING THE JUDGES BELOW

Petitioner has continued his practice of claiming, so far as we can determine, that every judge who rules against him is biased and should be disqualified from sitting on his cases. He contends in Neale that Judge Griesa should have disqualified himself pursuant to 28 U.S.C. §§144, 455 since Judge Griesa had allegedly mishandled the prior Shedler case and thereby demonstrated bias against plaintiff. He also contends in both petitions that Judge Van

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ftn. cont'd . . .
resorting to the courts and being on the winning side of a lawsut does not make a party a co-conspirator or a joint actor with the judge." In Dennis, however, the plaintiff alleged, unlike the case at bar, that an official act of the defendant judge was the product of "a corrupt conspiracy involving bribery of the judge."

Graafieland of the Second Circuit acted improperly. The Second Circuit rejected both assertions.

Petitioner has not demonstrated, nor is there, any reason for Judge Griesa's disqualification. Since Petitioner has failed to indicate any facts justifying the extraordinary relief requested, there was simply no reason for Judge Griesa to disqualify himself.*

Disqualification of a judge from presiding over a particular proceeding is authorized only in certain limited circumstances. 28 U.S.C. §455(a), (b)(1).

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* Judge Griesa was merely ruling on the Amended Complaint as a matter of law. Thus, even if Petitioner were correct that he should have disqualified himself (a proposition with which these Respondents are in total disagreement), Petitioner suffered no prejudice because the Second Circuit had to review the sufficiency of the complaint as a matter of law in any event. Nevertheless, as demonstrated below, disqualification of Judge Griesa was clearly not warranted.

It is well settled that the disqualification of a judge under either of these subsections must be based upon actions or factors which are extrajudicial in nature rather than those which arose during the legal proceeding itself. Thus, in In Re International Business Machines Corporation, 618 F.2d 923, 929 (2d Cir. 1980) (footnote omitted), the Court "conclude[d] that under Section 455(a) the bias to be established must be extrajudicial and not based upon in-court rulings." Accord United States v. Haldeman, 559 F.2d 131, 132-33 n. 297 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977); Blizard v. Fielding, 454 F. Supp. 318, 321 (D. Mass. 1978), aff'd, 601 F.2d 1217 (1st Cir. 1979); cf. Lazofsky v. Sommerset Bus Co., Inc., 389 F. Supp. 1041, 1044-45 (E.D.N.Y. 1975). In Re IBM Corp., supra,

618 F.2d at 928; United States v. Wolfson, 558 F.2d 59, 62 (2d Cir. 1977); United States v. Scaccia, 514 F. Supp. 1353, 1355 (N.D.N.Y. 1981).

Every contention which Petitioner asserts as a basis for Judge Griesa's disqualification arose from the proceedings in this matter and not from any extra-judicial source. Accordingly, there is absolutely no legal or factual basis upon which Judge Griesa should have disqualified himself from the matter. Moreover, as set forth in the Second Circuit decision on Petitioner's complaints against both Judges Griesa and Van Graafieland, these complaints were determined to be absolutely without merit.

IV.
THE ORIGINAL AND AMENDED COMPLAINTS FAILED TO COMPLY WITH RULES 8(c) AND (e) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND WERE PROPERLY DISMISSED

A case very much on point is Echols v. Voisine, 506 F.Supp. 15 (E.D. Mich. 1981), in which the district court dismissed an amended complaint with prejudice. The pro se plaintiff in Echols filed a complaint alleging "on-going violations of his civil rights, apparently in the form of an ever widening conspiracy to discriminate against him on the basis of race and to deny him his rights to due process." Id. at 16. The plaintiff's original complaint in Echols was forty-five pages in length, while his second complaint was reduced to fourteen. The district court, nevertheless, found that, although the Amended Complaint more nearly approached the requirements of Rule 8, the document con-

tinued to be "verbose, confusing and certainly not 'simple, concise and direct.'" Id.at 17.

The Court concluded that plaintiff's repeated failure to draft a proper complaint justified dismissal with prejudice. In dismissing the complaint, the court noted:

> Furthermore, as a matter of policy, the Court believes that a dismissal on the merits is proper in a case such as this for two reasons: first, to deter frivolous claims couched as civil rights violations, Slotnick v. Stavisky, 560 F.2d 31, 33 (CA 1, 1977), cert. denied 434 U.S. 1077, 98 S.Ct. 1268, 55 L.Ed.2d 783 (1977), especially when such are allegations of a giant conspiracy resting only upon conclusory statements, Ellingburg v.King, 490 F.2d 1270, 1271 (CA 8, 1974); and second, to avoid attempts to have federal courts retry civil rights issues once put to rest by the State courts. Id. at 19.

The Court also noted that, as in the case at bar, the plaintiff had several actions pending at the appellate and trial levels

of the state courts in Michigan and that much of the litigation involved the same underlying facts and allegations as the federal action.

Other cases supporting dismissal with prejudice include: Pesno v. Coopers & Lybrand, 92 F.R.D. 765, 770 (S.D.N.Y. 1981); accord In re "Santa Barbara Like It Is Today" Copyright Infringement Litigation, 94 F.R.D. 105, 109 (D. Nev. 1982); see, e.g., Nevijel v. North Coast Life Ins. Co., 651 F.2d 671 (9th Cir. 1981); Schmidt v. Herrmann, 614 F.2d 1221 (9th Cir. 1980); Smith v. International Longshoremen's Association, 592 F.2d 225 (4th Cir. 1979).*

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* See also on Rule 8 stadards: Koll v. Wayzata State Bank, 397 F.2d 124, 126-127 (8th Cir. 1968); Corcoran v. Yorty, 347 F. 2d 222, 223 (9th Cir. 1965), cert. denied 382 U.S. 966 (1964); Agnew v. Moody, 330 F. 2d

ftn. cont'd . . .

Petitioner's Complaints simply failed to satisfy the requirements of Rule 8, and, in the context of this case, dismissal with prejudice would have been appropriate on this ground.

V.
RESPONDENTS SHOULD BE AWARDED DAMAGES FOR RESPONDING TO FRIVOLOUS PETITIONS

The conclusion is inescapable that the petitions for writs of certiorari as filed with this Court by Mr. Yalkowsky are utterly and totally without merit. Accordingly, pursuant to this Court's

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ftn. cont'd . . .

868, 870-71 (9th Cir. 1964); Brainerd v. Potratz, 421 F.Supp. 836, 839 (N.D. Ill 1976), aff'd, 566 F.2d 1177 (8th Cir. 1977); Burton v. Peartree, 326 F.Supp. 755, 759 (E.D. Pa. 1971); Friedman v. Younger, 46 F.R.D. 444, 446-447 (C.D. Ca. 1969); United States ex rel. Holland v. Maroney, 299 F. Supp. 262, 263 (N.D. Ca. 1969); Jemzura v. Belden, 281 F. Supp. 200, 204 (N.D. N.Y. 1968).

Rules (Rule 49.2), Respondents should be awarded appropriate (in the circumstances of these cases, substantial) damages for having to respond to the frivolous petitions.

CONCLUSION

For all of the foregoing reasons, no writ of certiorari should issue from this Court and the petitions should be denied.

Respectfully submitted,

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